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Vol 28

82

# IRISH LAW REPORTS,

OF

## CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

AND

EXCHEQUER OF PLEAS,

DURING THE YEARS 1848 AND 1849.

**Queen's Bench:**

By JOHN S. ARMSTRONG, Esq., and WILLIAM H. FALLOON, Esq.

**Common Pleas:**

By MICHAEL ROBERTS WESTROPP, Esq.

**Exchequer of Pleas:**

By WM. ST. LEGER BABINGTON, Esq., LL.D., and LEWIS MORGAN, Esq.

**Exchequer Chamber:**

By DOMINICK M'CAUSLAND, Esq.

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# JUDGES AND LAW OFFICERS

*During the period of these Reports.*

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## COURT OF QUEEN'S BENCH.

*Lord Chief Justice.*—The Right Hon. FRANCIS BLACKBURNE.

*Second Justice.*—The Hon. PHILIP CECIL CRAMPTON.

*Third Justice.*—The Right Hon. LOUIS PERRIN.

*Fourth Justice.*—The Right Hon. RICHARD MOORE.

## COURT OF COMMON PLEAS.

*Lord Chief Justice.*—The Right Hon. JOHN DOHERTY.

*Second Justice.*—The Hon. ROBERT TORRENS.

*Third Justice.*—The Hon. NICHOLAS BALL.

*Fourth Justice.*—The Hon. JOSEPH DEVONSHER JACKSON.

## COURT OF EXCHEQUER.

*Lord Chief Baron.*—The Right Hon. DAVID RICHARD PIGOT.

*Second Baron.*—The Hon. RICHARD PENNEFATHER.

*Third Baron.*—The Hon. JOHN RICHARDS.

*Fourth Baron.*—The Right Hon. THOMAS LEFROY.

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**CORRIGENDA.**

- Page 150, line 11th from top, for "Roche, J.," read "John Roche."**  
,, 168, line 7th from bottom, for "does," read "did."  
,, 502, line 5th from bottom, for "assumpsit to debt," read "debt to assumpsit."  
,, 503, line 15th from top, after "£2 2s.," insert "each."  
,, 540, line 14th from top, for "prohibition," read "prohibition."

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# CASES

## IN THE COURTS OF

### QUEEN'S BENCH, COMMON PLEAS,

AND

### Exchequer of Pleas.

---

PATRICK SMITH  
v.  
JOHN ROSS MAHON and BARTHOLOMEW  
WARBURTON, Esqrs.

(*Exchequer of Pleas.*)

T. T. 1847.  
May 25, 27.

TRESPASS for assault and false imprisonment.—The declaration contained several counts which it is unnecessary to set out. Plea, as to both defendants—Not guilty.

The case was tried before Ball, J., at the Summer Assizes of 1846, for the county of Galway. From the evidence, it appeared that the trespasses complained of in the declaration consisted in the plaintiff, who had been convicted before the defendants and two other Justices of the Peace for the county of Galway, having been arrested and detained in the county of Galway gaol. The conviction

A conviction under the statute 10 G. 4, c. 34, and which was headed "county of Galway, to wit," recited that the plaintiff was convicted before four of her Majesty's Justices of the Peace "for the said county, for that he the said P. S. did assault

the police on Saturday evening, the 22nd day of July, at Ahascragh," without either naming the parties assaulted or alleging that the place where the offence was committed was within the jurisdiction of the Justices. *Held*, that the conviction was ambiguous and bad.

*Held also*, that the plaintiff was not, by having served notice of action upon the four Justices, thereby precluded from declaring against two only.

T. T. 1847.  
*Each. of Pleas.*

SMITH  
v.  
MAHON.

and warrant upon which the plaintiff was so arrested and detained were given in evidence and were as follows:—

County of Galway } “Be it remembered, that on the 24th day  
to wit. } “of July, in the year of our Lord 1843, at  
“Ahascragh, in the county of Galway, Patrick Smith is convicted  
“before us, Captain Warburton, R. M., John Ross Mahon, Esq.,  
“Charles Filgate, Esq., and Walter M'Donagh, Esq., four of Her  
“Majesty's Justices of the Peace for said county; for that he the  
“said Patrick Smith did assault the police on Saturday evening,  
“at Ahascragh, the 22nd day of July 1843; and we adjudge the  
“said Patrick Smith for his said offence to forfeit and pay the sum  
“of £1 sterling, and also to pay the sum of — for costs; and in  
“default of immediate payment of the said sums, to be imprisoned in  
“the county gaol for the space of one month, unless the said sums  
“shall be sooner paid.—Given under our hands, the day and year  
“above mentioned.

“JOHN ROSS MAHON.

“WALTER M'DONAGH

“BARTHOLOMEW WARBURTON.

“CHARLES FILGATE.”

The warrant was as follows:—

County of Galway } “By the Magistrates acting at Ahascragh  
to wit. } “Petty Sessions in and for said county.

“Whereas Patrick Smith has been this day convicted before us  
“for assaulting Sub-constable Rooney and others, on the oath of  
“Dr. Kearans and others, and for which offence we have adjudged  
“that he the said Patrick Smith shall be imprisoned in the county  
“gaol for the space of one month, except he shall sooner pay a fine  
“of one pound sterling together with costs, the whole of which said  
“sums to be paid into the Court of Petty Sessions aforesaid, to be  
“disposed of as the law directs.

|             |    |    |    |   |   |
|-------------|----|----|----|---|---|
| “Fine ..    | .. | .. | £1 | 0 | 0 |
| “Costs ..   | .. | .. | 0  | 0 | 0 |
| “Warrant .. | .. | .. | 0  | 1 | 0 |
|             |    |    | £1 | 1 | 0 |

“These are therefore to authorise and require all chief and other  
“constables and their assistants to apprehend and take the said

"Patrick Smith, and him safely to deliver into the custody of the  
 "governor of the county prison at Galway together with this  
 "warrant, there to remain during the space of one month, except  
 "he shall sooner pay the fine and costs aforesaid.—Given under our  
 "hands and seals this 24th July 1843.

T. T. 1847.  
*Each. of Pleas.*  
 SMITH  
 v.  
 MAHON.

"JOHN ROSS MAHON (L. S.)

"CHARLES FILGATE (L. S.)

"WALTER M'DONAGH (L. S.)

"BARTHOLOMEW WARBURTON (L. S.)

"To all Sub-Inspectors and other Constables,  
 "this to execute, and to the Governor  
 "of the county gaol at Galway."

The following notice of action was also proved in evidence :—

"To John Ross Mahon, Charles Filgate, Walter M'Donagh, and  
 "Bartholomew Warburton, four of her Majesty's Justices of the  
 "Peace in and for the county of Galway.

"Gentlemen—I do hereby, as attorney of, and for and on behalf  
 "of Patrick Smith of Ahascragh, in the county of Galway, yeoman,  
 "according to the form of the statute in that case made and provided,  
 "give ye and each of ye notice, that I shall at, or soon after, the ex-  
 "piration of one calendar month from the time of your and each of  
 "your being served with this notice, cause a certain writ, commonly  
 "called a *capias ad respondendum*, to be sued out of her Majesty's  
 "Court of Exchequer in Ireland against ye and each of ye at the  
 "suit of the said Patrick Smith, in an action of trespass and false  
 "imprisonment, and proceed thereon according to law; that is to  
 "say, for that ye the said John Ross Mahon, Charles Filgate,  
 "Walter M'Donagh, and Bartholomew Warburton, at," &c., setting  
 out the various trespasses and imprisonments complained of.

"Dated the 13th of December 1843,

"COLL ROCHFORD,

"Attorney for the above named Patrick Smith,  
 "residing at No. 36 Upper Dorset-street, in  
 "the city of Dublin, and at Ahascragh, in the  
 "county of Galway."

Endorsed—"To John Mahon, Charles Filgate, William M'Donagh, and  
 "Bartholomew Warburton, Esqrs., four of her Majesty's Justices of the Peace  
 "in and for the county of Galway.

"COLL ROCHFORD, Attorney for," &c.

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The defendants' Counsel relied on the above conviction as a bar to the action, and called for a nonsuit or for a direction to the jury to find for the defendant; but the learned Judge told the jury that the conviction given in evidence afforded no legal bar to the action, and directed them to find a verdict for the plaintiff; and they found accordingly for £10 damages and 6d. costs.

To this direction the defendants' Counsel excepted for the following reasons; first, that the conviction was a bar to the action; secondly, that the notice of action proved did not support the declaration; thirdly, that the original writ was not entered and filed within one month from the return day, and that the second writ, proved to have been issued, was not a regular renewal of the first; fourthly, that the return to the said original writ was not certified by the said plaintiff or his attorney; fifthly, that the first writ had not on it a return of *non est inventus*, or any return as regarded the defendants; sixthly, that nothing was shown to connect the declaration with the writs, or appearances of the defendants, because the said original writ was not proved to have been duly served on the defendants.

*J. G. Holmes* and *Armstrong* (with whom was *Fitzgibbon*), in support of the exceptions.

The conviction in this case is good, under statute 10 G. 4, c. 34, ss. 36 and 44,\* and is a bar to the action.—[PENNEFATHER, B. The jurisdiction given is over persons charged with assaulting some particular person.—PIGOT, C. B. The conviction should also set out the offence.]—The Magistrates are not to be tied down to a

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\* The 36th section of the statute 10 G. 4, c. 34, enacts, "That when any person shall unlawfully assault or beat any other person, it shall be lawful for two Justices of the Peace, upon complaint of the party aggrieved, to hear and determine such offence."

The form of conviction given by the 44th section of the statute is as follows:—  
 "Be it remembered that on the — day of — in the year of our Lord — at — in the county of — [or riding, division, liberty, city, &c., as the case may be], A. O. is convicted before us [naming the Justices] two of his Majesty's Justices of the Peace for the said county [or riding, &c.], for that he the said A. O. did [specify the offence and the time and place when and where the same was

particular form of conviction; the statute is for the protection of Magistrates.—[PIGOT, C. B. Consistently with this conviction the defendant may have assaulted ten policemen on ten different occasions; it may have been an aggravated assault against one and a common assault against another. There is an ambiguity in it.—PENNEFATHER, B. The jurisdiction of the Magistrates is given to them to convict upon the complaint of the party aggrieved. Have you any authority to support this conviction?—]No; but the Act merely directs that the Magistrates shall specify the offence.—[PIGOT, C. B. What is the offence? The assault of the complaining party; the party should be named.—RICHARDS, B. It is a conviction for assaulting *somebody*.]—It is for an assault on the police at Ahascragh; it is not all police; those police, who were at Ahascragh, can all be identified.

The notice of action against four Magistrates does not justify this proceeding against two. The notice is, "I shall cause a writ (not writs) to be issued against ye, and each of ye." *Lovelace v. Curry* (a) and *Strickland v. Ward* (b) show how great is the particularity required in the notice in such cases. *Aked v. Stocks and others* (c)—[In answer to PENNEFATHER, B.]—The variance in that case was, that the notice stated that the Magistrates had unlawfully convicted the plaintiff, and had issued a warrant for seizing his goods directed to one Bark, whereas the warrant was directed to the

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(a) 7 T. R. 631.

(b) 7 T. R. 633.

(c) 4 Bing. 509.

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committed, as the case may be]; and we the said Justices adjudge the said A. O. for his said offence to be imprisoned in the ———, and there kept to hard labour for the space of [or we adjudge the said A. O. for his said offence to forfeit and pay the sum of ———] [here state the amount of the fine imposed], and also to pay the sum of ——— for costs; and in default of immediate payment of the said sums, to be imprisoned in the ——— for the space of ——— unless the same be sooner paid [or, and we order that the said sums shall be paid by the said A. O. on or before the — day of ———], and we direct that the said sum [*i. e.* the amount of the fine] shall be paid to ———; and we order that the said sum of ——— for costs, shall be paid to C. D. [the party aggrieved.]—Given under our hands the day and year above mentioned."

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constable of Halifax.—[Pigot, C. B. But suppose that the four Magistrates had appeared, and there was only a prosecution against one, or that three of them had died?—If a writ be against three, a declaration against one may be good, but not a declaration against two; and in bailable process a declaration cannot be filed against one on process against four, by reason of the *ac etiam* clause: *Thompson v. Cotter* (a). Where the process is not bailable, the plaintiff can proceed, where the writ includes four, against each—*Stables v. Ashley* (b)—but not against two jointly. I have not found an authority which decides this; but I have not discovered any case in which it has been done.

*Robinson, contra.*

This conviction, if not warranted by some Act giving a form of the same kind, is bad: *Rea v. Jukes* (c); in that case the word “knowingly” constituted the grievance of the offence. In this case the word “unlawfully” constitutes the gist of the offence (and ought to have been inserted). There are many assaults known to the law which would not support a conviction, as an assault to prevent a breach of the peace, to prevent an assault upon a third person. The conviction here only states that the plaintiff on such a day, at Ahascragh, assaulted the police.

The venue is not stated, and that is clearly bad; and there is not the word “aforesaid” to couple it with what has gone before. *Rex v. Hazell* (d) shows that the venue in the margin will not cure this objection: *Rex v. Austin* (e). *Regina v. Burnaby* (f) does not touch this case.

As to the objection that this declaration is only against two, the notice being of an action against four:—In *Agar v. Morgan and others* (g) and *Bax v. Jones and others* (h), the converse of the present case was held good. *Jones v. Simpson and Derbyshire* (i)

(a) 1 M. & S. 55.

(c) 8 T. R. 536.

(e) 8 Mod. 309.

(g) 2 Price, 126.

(b) 1 Bos. & Pul. 49.

(d) 13 East, 139.

(f) 2 Ld. Raym. 901, 902.

(h) 5 Price, 168.

(i) 1 Cr. & Dix, 174.

is also in the plaintiff's favour. The object of the notice is to enable the party to tender amends.

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Here the notice is of an action against four, and each of the four; one of the defendants thinks that an action such as that specified by the notice cannot be maintained, it may prevent him from tendering amends. The declaration here omits two of the parties, though in the notice it is said to be a joint trespass by four.

PREOR, C. B.

Suppose the four Magistrates had appeared, could not the plaintiff have filed separate declarations against each of them? But with respect to the conviction, it seems to me to be open to several objections. On looking into the case of *Rex v. Hazell* (a), decided in England, on a statute (41 G. 3, c. 38) which gives a form of conviction similar to the one given by this statute (10 G. 4, c. 34), save that it does not require the place where the offence has been committed to be specified, which is required here, I find that in that case it was held, that notwithstanding, an omission of the place in which the offence was committed invalidated the conviction.

Exceptions overruled.

(a) 13 East, 139.

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Lessee of the CORPORATION OF DUBLIN

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May 28.

*Held*, that an unaccepted proposal for a lease made by one C. F. (whose personal representative the defendant was) to the parties from whom the lessors of the plaintiff derived, such proposal having been signed by a third party for and in the presence of C. F., who was from illness unable to write, was evidence of an acknowledgment of title within the statute 3 & 4 W. 4, c. 27, s. 14.

THIS was an ejectment brought by the Corporation of the City of Dublin, to recover possession of certain premises situate in Stephen-street, in the city of Dublin.

At the trial, which was had before LEFROY, B.,\* at the Nisi Prius Sittings of this Court after last Hilary Term, in order to take the case out of the operation of the Statute of Limitations, the lessor of the plaintiff tendered in evidence as an acknowledgment of title within the statute 3 & 4 W. 4, c. 27, s. 14, a certain document purporting to be a memorial to the Corporation for a lease, signed by one Catherine Flanagan, whose representative the defendant was shown to be. There was no date to the memorial, nor did the proposal it contained appear to have been accepted, but there was evidence to show that it was executed in the year in which the cholera visited this country, and the paper upon which it was written bore the water-mark of the year 1832. It appeared also, that the document was not signed by Catherine Flanagan with her own hand, but was signed for her, and in her presence by one Mary McLaughlin, Catherine Flanagan being at the time unable to write from illness. The learned Baron under these circumstances refused to let the document go to the jury as evidence of an acknowledgment of title under the statute 3 & 4 W. 4, c. 27, s. 14, but reserved the question for the consideration of the jury; and accordingly, there having been a verdict for the defendant—

*Fitzgibbon* now moved for a new trial.

The case of *Hyde v. Johnston (a)*, which was decided upon the

(a) 3 Scott, 289; S. C. 2 Bing. N. C. 776; S. C. Hodg. 94.

\* The LORD CHIEF BARON had been Counsel in the case before his elevation to the Bench.

statute 9 G. 4, c. 14, s. 1, and may be relied on at the other side, is distinguishable from the present case; the signature was not in the presence of the party. An acknowledgment ought to be held to be the act of the mind of the party making it. It is said that the word "agent" being omitted from that part of the 14th section which makes an acknowledgment in writing signed by the party in possession a bar to the operation of the statute, shows that the signature to the acknowledgment must be in the party's own hand; but though in general there must be a written authority to sign and seal a deed for another, yet, if it is done in the party's presence no such authority is necessary: *Story on Agency*, pp. 55, 56; *Lovelace v. Curry* (a); *Ball v. Dunsterville* (b). The deed in *Ball v. Dunsterville*, which was stated to be the deed of two partners, was sealed with the seal of but one, yet the Court held that it was executed by both, the seal having been applied by one partner in the presence of the other.—[*Ward v. Swift* (c) was cited upon the question of the value of the memorial as evidence in favour of the plaintiff.]

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After hearing *Fitzgerald* for the defendants—

The COURT granted a *venire de novo*; directing the costs of the former trial, if the defendant should succeed, to be costs in the cause; the lessors of the plaintiff in no event to have the costs of the former trial.

(a) Sir W. Jones's Rep. 208.

(b) 4 T. R. 314.

(c) 11 Price, 19.

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STEPHENSON v. STEPHENS.\*

May 28.

A weighmaster appointed under the 3rd section of the statute 4 *Anne*, c. 14, holds his office for life.

An appointment to hold it during pleasure is void.

THIS was a motion to set aside a nonsuit.

Action on the case, for the disturbance of the plaintiff in his office of weighmaster of the city of Dublin. In support of his case the defendant produced an appointment to the office, made by Timothy O'Brien, Lord Mayor of Dublin, conferring it on the plaintiff during pleasure, and revoking all former appointments. Stephens the defendant, it appeared, had been in under an appointment made by a former Lord Mayor, and it was contended that the appointment was one for life, or during good behaviour, and therefore that Mr. O'Brien had no power to revoke the appointment of the defendant except for misconduct; and the LORD CHIEF BARON, who tried the case, being of this opinion, the plaintiff was nonsuited.

*Macdonogh* now showed cause against a motion to set aside the nonsuit.

The appointment of the plaintiff is an affectation of power; for the statute 4 *Anne*, c. 14, under which alone it can be made, gives the office, as I submit, to the appointee *quamdiu se bene gesserit*, and not *durante bene placito*. *Harcourt v. Fox* (a) shows that such offices are rather for life than during pleasure: *Bacon's Ab. tit. Offices*, H. It is the policy of the law that such offices are to be held for life, and forfeitable only for misconduct. The appointment is made under the 3rd section of the Act, which provides, "That before the 1st of November 1705, there shall be appointed in every city, borough and market-town within this kingdom, by the Chief Magistrate of the same, except in places where the tolls and customs belong to any other person, and in such case by the person to whom the tolls and customs belong, one honest, discreet person,

(a) 1 Show. 426.

\* *PIGOT*, C. B., was sitting at Nisi Prius.

"who shall be weighmaster in the said city, borough, or market-town; who shall be sworn justly, truly and indifferently to weigh all goods, wares and merchandises as shall be brought unto him, between buyer and seller." The 5th section enacts, that if the Mayor for the time being of any city or town "shall neglect to provide a set of brass standard weights in manner aforesaid, or shall neglect to *appoint and swear* a weighmaster in manner aforesaid, or shall neglect to provide a good, just and true balance, or beams with scales and weights, sufficient and convenient for the weighing of all manner of goods, wares and merchandises between buyer and seller, that then and in such case every Mayor for the time being of such city or town, being a county in itself, or other person as aforesaid, shall forfeit for every month that all or any of the particulars aforesaid shall be wanting the sum of forty shillings:" and it also provides, that "the Mayor, &c., for the time being shall, on the death or removal of any weighmaster, appoint and swear another in the place:" and the 9th section provides, "That no person or persons whatsoever shall act as weighmaster, or at any time execute the said office" before he takes the oath prescribed by the statute 3 *W. & M. c. 2 (Eng.)*. These sections import that the office is to be held for life, except in case of misconduct. Once the weighmaster is in by appointment of the Chief Magistrate, he is in for life, though the Chief Magistrate goes out of office; just as the Clerk of the Peace, who, when once in, is in for life, though the *Custos Rotulorum*, who appoints him, holds only during pleasure.—[PENNEFATHER, B. But the Clerk of the Peace does not hold by statute but by Common Law.]—*Ferguson v. Kinnoull* (a); *Harcourt v. Fox* (b); *Com. Dig. tit. Office, K.* The 52 *G. 3, c. 134, ss. 2, 5*; 4 & 5 *W. 4, c. 49*; 5 & 6 *W. 4, c. 63*, show that such office is to be held for life. *Smyth v. Latham* (c) is distinguishable from the present case. Tindal, C. J., says:—"Looking to the object of the Act, the language of the Act, and the various provisions contained in it, we think the meaning and intention of the Legislature was, that the appointment should be during pleasure only, and not

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(a) 9 Cl. & Fin. 251.

(b) 1 Show. 497.

(c) 9 Bing. 703.

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“for the life of the grantee.” And in p. 705 he says:—“The object therefore of the Legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the Exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour: unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be completely attained; for if the appointment is necessarily during good behaviour, that is, for life, the Commissioners of the Treasury might indeed always increase the number, when the service of the public demanded more, but they could never reduce the number, when from new circumstances it became greater than the performance of the public service required.” In that case the very purpose of the Act could not be effected by the office being held for life; and in page 707 the learned Judge says, with reference to the objection, that by the 11th section of the Act (48 G. 3, c. 1) paymasters are made subject to such rules and regulations as the Commissioners shall think fit to establish for the better execution of the Act and the satisfaction of the proprietors—“And it is contended that such provisions would be altogether unnecessary if the Commissioners have the power of dismissal, or if the appointments were during pleasure only. If, indeed, Acts of Parliament never contained any thing but what was strictly necessary, this argument might be entitled to some weight; but if the necessary inference to be drawn from the other parts of the Act is, as we conceive it to be, that the Commissioners can appoint during pleasure only, then this provision, even though in strictness unnecessary, must be considered as introduced *pro majori cautela* only.”

This case, and the statutes to which I have referred, show that the proper way to come to a conclusion upon the mode of interpreting this Act is to consider the whole policy of the law on the subject, and the statutes passed *in pari materia*. There is nothing in the statute of *Anne* to show that the weighmaster's office was to be of a precarious nature, or to indicate the possibility of his removal at pleasure; the only difficulty on the subject which pressed upon the LORD CHIEF BARON's mind at the trial was a case from *Hardress's*

*Reports, Jones v. Clarke (a)*.—[PENNEFATHER, B. There is another circumstance which appears to me to favour your view of the Act; it says that after the first appointment the Chief Magistrate shall on the death or removal of the weighmaster appoint another; but it does not say from time to time.]—The statute in the 5th section directs certain things to be done “from time to time;” such as a common beam or balance and weights to be preserved and maintained by the Chief Magistrate: but it does not direct him from time to time to appoint a weighmaster, but only on the occurrence of one of two disjointed events, the death or removal of the weighmaster.—[PENNEFATHER, B. Was Mr. O’Brien Lord Mayor when the action was brought? because if not, an appointment during pleasure of the Lord Mayor ceases when the Lord Mayor goes out.]—There can be no doubt of that: *The King and Queen v. Owen (b)*.—[In answer to the Court it was stated that Mr. O’Brien was Lord Mayor when the declaration was filed, but not when the case came to trial.]—PENNEFATHER, B. This is not an appointment under the Act, the Act gives merely a power to appoint generally; but this is an appointment “during pleasure:” there are no such words in the Act.—RICHARDS, B. Where the appointment is made by an annual officer during pleasure, the office ceases when the officer goes out.—PENNEFATHER, B. There are monstrous inconveniences in holding that there can be an appointment during pleasure under this Act. The Lord Mayor is subject to heavy penalties in certain cases, and if when one Lord Mayor goes out the appointment ceases, the other may become liable to very heavy penalties.]—The Lord Mayor has no power under the statute to revoke former appointments; if the Lord Mayor has this power it will deprive the parties removed of any compensation under the Municipal Corporations Act, 3 & 4 Vic. c. 108. In *The King and Queen v. Owen* the Custos made an appointment during pleasure, which the Court held bad, though he was himself only appointed during pleasure; so here the Lord Mayor in fact executes no appointment if he appoints during his own pleasure, making the officer

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(a) Hard. 46.

(b) 4 Mod. 293.

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his own servant, not the servant of the public. The only difficulty which arose in the LORD CHIEF BARON's mind was from the case of *Jones v. Clarke* (a), citing *Sir George Reynels's case* (b). The statute upon which the question arose in that case was the statute of *Jac.* 1, c. 21, repealed by statute 10 *Anne*, c. 43, relating to the garbling of spices. It was an old office in the city of London: an information was filed for not garbling twenty-two bags of spices according to the statute. Upon not guilty pleaded, a special verdict was found that the city of London made a lease of the office of garbler to one Hatton for thirty-one years at a rent of £400, the lease to be void for non-payment; the office to be executed by him, his deputies or assigns: afterwards the plaintiff obtained a latter grant and lease for three years of the office, the rent not having been paid, and within which three years these spices were garbled. The jury found the statute of *Jac.* 1, and that the plaintiff was in possession by virtue of the grant; the question was whether of the two had the better title to the office? It was objected for the defendant that the office could not be granted for years, and that the plaintiff's appointment was void and not authorised by the statute. The Court gave judgment for the plaintiff, holding that the appointment might be good as an appointment, even if the lease was bad. But that case does not rule the present; for the previous statute of 1 *Jac.* 1, c. 19, since repealed by statute 6 *Anne*, c. 16, recited frauds, and provides that all spices shall be garbled before being exposed for sale. It did not meddle with the office; it did not give any power of appointment; it is wholly different from an office created for the first time for the prevention of frauds.—[RICHARDS, B. The statute does not give any power of appointment.]—It is an office of great antiquity, possessed by the Corporation of London from time immemorial: *Todd's Johnson's Dict.* The appointment in *Jones v. Clarke* was the private property of the Corporation; the rent was part of their property; but here the moment the appointment is made, the Chief Magistrate is *functus officio*; he can reserve no rent out of the office; his duty ceases, and therefore the case in *Hardress* does not govern the pre-

(a) *Hard.* 46.

(b) 9 *Rep.* 95 (a).

sent case. There is no case in which such an office as the present has been held to be an office during pleasure.—[LEFROY, B. For what purpose do you cite *Bacon's Abr.*, p. 30?—To show that the law leans in favour of the construction that such offices are to be held for life: so in page 32 he says:—"All these and several others "have been granted for years; but no dispute having been made of "the validity of them, how far some of them would hold at this day "may be a question."—[LEFROY, B. The observation of *Bacon* in page 31 is, "that such offices as do not concern the administration "of justice, but only require skill and diligence, may be granted for "years, because they may be executed by deputy without any inconvenience." Then he makes the general observation to which you have referred.]

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*Sir Colman O'Loughlen, contra.*

The sole question is, whether the appointment of the plaintiff is consistent with the statute? The person who made the appointment was Lord Mayor when the declaration was filed and plea pleaded, and therefore there can be no question on that ground; there is no allegation here that the defendant was appointed by any one. The Court are bound to presume that when the plaintiff's appointment was made, the office was vacant, no appointment to it having been proved. I admit, that at one time there was an opinion in text books that where a statute created an office without stating the time for which it was to be held it was an office for life; but that position has been overruled by the case of *Smith v. Latham* (a), deciding that the Court are to look at the whole object and tenor of the Act to ascertain its meaning, and overruling the doctrine that the office is in such case necessarily for life.

I admit the authority of the case in 4 *Modern*, and that the words "during pleasure" are not surplusage; but I maintain that the proper mode of appointment is during pleasure; secondly, that even if not the most proper style, yet that it is a good appointment: to hold otherwise would be to decide that where a private person appoints a

(a) Bing. 703.

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weighmaster he has no control over him except by suing out some obsolete writ out of Chancery, or else by filing an information. The statute, in the 3rd section, which gives the power of appointment, says nothing whatever about the time for which the appointment is to be; the 5th section provides that the Chief Magistrate for the time being, or the person or persons that receive the tolls and customs of every or any market as aforesaid, shall, on the death or removal of any weighmaster, appoint and swear another to the place.

It has been said, that as the words "from time to time" are not used in the section giving the power of appointment, the appointment cannot be during pleasure; but if those words were in the statute there could be no question about it: the question arises from the omission of those words. See the inconvenience which would result from holding that the argument made use of by the plaintiff's Counsel is correct:—The person having the power of appointing a weighmaster is bound to have a proper person in the office; but if these arguments be right, if the weighmaster be dishonest, a private person has no power of removing him except by a writ out of Chancery or an information.

The statute of 52 G. 3, c. 134, is only conversant as to public bodies and does not relate to private individuals, and it gives a short power of removal, showing thereby an intention that the office shall be for life; but in case of misconduct, giving the Corporation a short mode of removing the officer without an information—drawing thereby a distinction between this statute and the statute of *Anne*. The statute 52 G. 3, c. 134, s. 4, enacts that the Mayor, Aldermen and Common Council of each city, Chief Magistrate and Burgesses of each town corporate, &c., "shall and may, from time to time, upon "oath of one or more credible witnesses, &c., and upon full proof of "the misbehaviour of such public weighmaster or joint public weigh- "master, his or their successor or successors, or deputy or deputies, "or any of them, in his or their office, upon full hearing of him or "them, or upon his or their being duly summoned and neglecting "to appear, &c., remove such public weighmaster or weighmasters, "or his or their successor or successors, deputy or deputies, trustee "or trustees, or any of them, as the case may be."—[PENNEFA-

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THEER, B. That statute manifestly contemplates that the general words giving a power of appointment give a power of appointing for life; the words are the same as in this Act].—There is a great distinction between that statute and this Act, which is conversant with appointments made by private persons, the other only with appointments made by public bodies.—[LEFROY, B. The appointment is in such case a private appointment for the benefit of the public. The public benefit is the object of the Act.]—It is very doubtful whether an information for the officer's removal for bad conduct would lie: the clause in the 52 G. 3, c. 134, giving a power of removal, would be a strong argument to show that the parties appointing had no power of removal at Common Law. In *Smith v. Latham*, Tindal, C. J., says:—"Where, however, such powers of revocation or dismissal are expressly given by any Act, in which the necessary object of the Act itself implies, as here, that the officer shall be appointed during pleasure only, we think, in such cases, the insertion of the power of dismissal, or the clause that the appointment is held during pleasure only, must be referred to the principle before adverted to, namely, that the provision is inserted *ex abundante* and *pro majori cautela* only." It is merely a ministerial office; it is not an office requiring very great skill; there is nothing judicial in it, nothing requiring it to be held for a long time to enable the person to discharge the duty in a discreet manner: *Vin. Abr. tit. Officer*, E. p. 8. The King used to appoint weighmasters, and his proper mode of appointment was during pleasure.—[PENNEFATHER, B. Was the appointment in the King before the statute of *Anne*?]—Yes.—[LEFROY, B. Then, if so, how could it have been taken from him without express words?]-The King had the power of appointing persons to regulate matters connected with the markets (statute 17 Rick. 2, c. 5). I do not say that he could appoint a weighmaster who could take the tolls specified by the statute.—[PENNEFATHER, B. If the statute related to the same kind of appointment there would be a good deal in the argument; for if the statute gave the power of appointing in the way the King had it, and he had the power of appointing during pleasure, there would be a good deal in

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the argument.]—*Omne majus continet minus*: *Plowden*, p. 307; *Earl of Shrewsbury's case* (a); *Veale v. Prior* (b). If a person has a power to appoint for a greater period he may for a lesser period, and there is nothing inconsistent in his appointing during pleasure if he has the power of appointing for life, though there might be something inconsistent in his appointing for years; but he may appoint to a lesser estate of the like nature, and there is no inconvenience resulting from holding that this appointment may be made during pleasure.

*Macdonogh*, in reply.

The case of *Veale v. Prior* (c) was an action on the case for the disturbance of the plaintiff in the exercise of his office of registrar of policies of insurance. It refers to the *Garblers' case*. The decision does not in the least degree affect the plaintiff's rights; the whole point on which it turns is the validity of a former grant for years, in preference to a latter grant for life. Hale, C. B., in delivering judgment, says:—"Here the title appears on the whole matter to be "for the defendant, because his grant is prior to the other, and it is "good though it be but for years; first, because where a greater "estate can be granted there regularly a lesser estate may, unless "there be some special reason to the contrary; and if this office may "be granted for life in tail or in fee, it may be granted for years, "and it is not universally true that offices cannot be granted for "years, for some can, and are so granted; secondly, this is not an "ancient office, but one erected *de novo*." No doubt, in the exercise of a power a party can relinquish a portion of his right: *Isherwood v. Oldknow* (d) establishes that. The office referred to in *Hardress* was an office not controlled by any custom: the cases referred to in *Com. Dig. tit. Office*, K. 3, do not decide the present; for instance, in the case of *The King v. Rookes* (e), searcher of the port of Sandwich, a *scire facias* was brought to repeal the patent; and it was

(a) 9 Coke, 47, a.

(a) Hard. 357, 351.

(c) Hard. 351-7.

(d) 3 M. & S. 382.

(e) Cro. Car. 492.

held, that his voluntary absence was a forfeiture of his office.—  
[PENNEFATHER, B. That case was subsequent to the statute of  
*Rich. 2*, cited by *Sir Colman O'Loghlen*.]—Yes, and to the statute  
1 *Jac. 1*.

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*Sir Colman O'Loghlen.*

It appears from the Municipal Corporations Act (3 & 4 *Vic. c. 108*,  
s. 99), that only for it the Corporation would have had the power of  
removing the weighmaster.

PENNEFATHER, B.

We think that we ought not to disturb the nonsuit in this case.  
It is an action upon the case brought by the plaintiff for disturbance  
of his office of weighmaster of the city of Dublin, the plaintiff claim-  
ing the office by virtue of an appointment executed to him by the  
Lord Mayor of Dublin appointing him to his office during pleasure;  
and as the case comes before us we are bound to consider the vali-  
dity of the plaintiff's title by itself, without examining that of the  
defendant, if any; and the question is, whether this appointment  
made during pleasure is one warranted by law? The Act 4 *Anne*,  
c. 14, ss. 3, 5, are those upon which the question depends. By the  
3rd section the Chief Magistrate is authorised to appoint a weigh-  
master in all cities, boroughs and market-towns, except where the  
tolls and customs belong to an individual; that is, as I take it, not  
either to the head of the Corporation or to the Corporation itself.  
The 5th section provides, amongst other things, that in case of the  
death or removal of the weighmaster, the Chief Magistrate for the  
time being may make the appointment; and that section provides  
that certain things necessary to carry on the business shall be  
provided, and subjects the person having the right to make the  
appointment to penalties in case of his neglecting to make the  
appointment or provide the matters required by the Act.

Now, the question is, whether on the true construction of this  
statute, the person having the right of making the appointment can  
make an appointment to hold for his will and pleasure? The nature  
of the appointment, the nature of the duties to be performed, and

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the provisions in the Act for the appointment of a new person on the avoidance or removal of the person filling the office, ought to be very fully considered in determining the question; and on consideration it appears to us that the meaning of the Act is, that the appointment should be held during good behaviour and not for a shorter period. It has been contended that if the power exists in the Lord Mayor of making the appointment for life, he may make it for a less estate; but this principle does not appear to me to apply to an appointment like this. It is a trust imposed by the Act on the party making the appointment, and he is not at liberty to make one different from that which the Act authorises him to make. It has been said, that though this Act, where it applies to the Chief Magistrate of a city, should be considered as authorising an appointment for life, yet where an individual has the power of appointment he may exercise it during pleasure; but I do not see ground for any such distinction. The Act is passed for a public purpose, for regulating the weights to be used in this kingdom, and that salt and meal should be sold by weight, and it gives the appointment to the Chief Magistrate in every city, borough or market-town, except in places where the tolls and customs belong to any other person; but the power of appointing is given to all to be exercised in the same manner. If this be so, as I take it clearly to be, notwithstanding what has been said about the interference with private rights, it appears to me that the Legislature have, by the 52 G. 3. c. 134, put a clear construction on the Act we are now construing. In the clause in 52 G. 3 relative to the appointment of a weighmaster, using terms precisely similar to those in 4 Anne, provisions are made for the removal of the appointees from time to time, upon complaint made on oath, and upon full proof of misbehaviour, with a power of appeal to the Justices of Assize, who are empowered to restore him if they shall think fit—a matter perfectly useless if the appointment were to be held during pleasure. It is admitted that these words “during pleasure” cannot be rejected as surplusage, that they are essential to it, and that therefore this appointment cannot be taken as one for life or for good behaviour, which alone, it appears to me, the statute authorises.

It is true, that the construction of an Act of Parliament is to be governed by attending exactly to the object and words of the Act itself; and the case of *Smyth v. Latham* (a) is quite an authority for this position. That case came before Lord Tenterden (upon the statute 48 G. 3, c. 1); and it was his opinion, that considering the provisions and objects of the Act, it could not possibly be held that any thing greater than an office during pleasure was conferred. But the reasoning of the Court in that case goes to take the case out of the general rule of law, by the expressions in the Act of Parliament; the expressions in that Act and the object are quite dissimilar to those in 4 Anne, which further meet the construction we are giving to it in the legislation of the Municipal Corporations Act 3 & 4 Vic. c. 108. The 99th section provides, that "every person who shall have been elected or appointed by any body corporate, named in any of the schedules to this Act annexed, or by any member or members thereof in his or their corporate capacity, to be a clerk of a market or a weighmaster of all goods, wares and merchandises, or a weighmaster of butter or taster of butter or assay-master, and shall not be entitled to such office as a member of such body corporate in his corporate capacity, shall continue to hold such office, and to execute all the duties heretofore belonging thereto, as if this Act had not been passed: provided always, that if such office shall be filled up upon any resignation or removal made after the passing of this Act, in such case the person appointed to such office may be removed at the pleasure of the Lord Lieutenant; and any person so removed shall not be entitled to compensation under the provisions of this Act." From these words, it appears to me quite manifest, that the Legislature could not have considered this an office to be held at will; and truly it would be a matter of extreme inconvenience that this office should be one to determine, at the will of the appointee, becoming void on his death or removal; thus subjecting his successor to penalties, if there be not appointment made by him within a reasonable time; so that penalties to a considerable amount must

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(a) 9 Bing. 702.

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have been, in all probability, incurred: and further, it may not be amiss to observe that a more discreet choice will, in most instances, be made, and the public better served, where the person is to hold his office during good behaviour, than where his tenure is to be dependent on the will of the person making the appointment.

Upon the whole, we are of opinion that this nonsuit is right.

RICHARDS, B.

I concur in the opinion that the LORD CHIEF BARON was right in his direction in this case, and that we ought not to set aside this nonsuit. Regard being had to the duties of this office, and regard being had to the statute, I think we are bound to hold that this office cannot be granted except during good behaviour. It is particularly important that offices of this description should not be held merely during pleasure, that an officer of this kind should not be liable to be dismissed capriciously.

The principle has long since been settled, that though one holds his own office during pleasure, he may confer another office on a person for his life, and it cannot now be disputed; and the circumstance of the Lord Mayor of Dublin being an annual officer does not at all interfere with the ground of our decision.

It has been said that it would be more convenient that the weigh-master should hold during pleasure than for life, for that if he misconducted himself he could be dismissed without difficulty; I can only say that my mind is not affected by that argument in the least. On the contrary, I am of opinion, speaking generally, that it would be far better that all public officers, who have important public duties to discharge, should hold their office during good behaviour rather than during pleasure. It is very important that all such officers should be independent of their patrons and of influence of any kind. I think it is unnecessary to go more at length into the subject, as I fully concur in the judgment pronounced by my Brother PENNEFATHER, and I quite adopt the case in 9 *Bingham* (*Smith v. Latham*), and the principle there laid down.

LEFROY, B.

I agree with the opinion expressed by my learned Brethren. In this case the question turns upon the exercise of a power given by this Act of Parliament (4 *Anne*, c. 14). The intentions of the Legislature, therefore, must be the guide by which the question must be determined; first, we must look to the terms of the Act. Now, it must be admitted that the terms of the sections themselves would imply a power to grant the office for life; they may be controlled by other words, but unless they are controlled, they must be taken to give a power to appoint for life. I apprehend there could be no doubt that an appointment in the words of the Act "of A B to be weighmaster," would give him a life estate. I shall not go further into this question; it would be waste of time, it has been so completely discussed by the other Members of the Court; but I wish to make an observation on an argument founded upon the case cited from *Hardress's Reports*—*Veale v. Prior* (a). It is there said "that where a greater estate may be granted there regularly a lesser may;" but it is to be observed that Hale, C. B., qualifies this by adding, "unless there be some special reason to the contrary." It is further to be observed that the case cited is different in this respect from the present; that was the case of a grant—this is the case of the exercise of a power. Now, we know that a power to grant an estate for life cannot be well exercised by giving a lesser estate, viz., an estate for years. This is the case of a power given by the statute for the public good, and it must be construed strictly; and the Legislature must be considered to have had good reasons for giving a power to be exercised by giving an office for life, and if you appoint to the office during pleasure you would be contravening the intentions of the Legislature. It therefore appears to me quite clear on that ground, that the appointment of the plaintiff is void under the statute. Without going over again what has been so clearly expressed by my learned Brethren, it is enough to say that I am of opinion that the nonsuit in this case ought not to be set aside.

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Motion refused.

(a) p. 357.

T. T. 1847.  
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HARTON

v.

THE GUARDIANS OF THE POOR OF THE BALLINROBE  
 UNION.

May 28.

A return of goods on hands for want of buyers is a bad return to a writ of *venditioni exponas*.

Where a Sheriff being ruled to return the writ under a conditional fine, does actually return it, the Court will not if the return is bad make the fine absolute, but will compel him to amend his return.

BERWICK, with whom was *Sherlock*, moved that the late Sheriff of Roscommon be ordered to amend his return to the writ of *venditioni exponas* which had issued in this cause, by returning the full amount of the execution, and that the conditional fine imposed on him to compel him to return the writ be made absolute. The Sheriff had, it appeared, when ruled to return the writ, made a return of goods on hands for want of buyers.

*J. G. Holmes*, for the Sheriff, cited *Leader v. Danvers* (a).—  
 [PENNEFATHER, B. It is a bad return to a *venditioni exponas*; it would be a good return to a *feri facias*.]—What is a Sheriff to do in such case?—[PENNEFATHER, B. If the Sheriff shows the Court that he could not sell the goods, we might enlarge the time, or we might issue a new writ at the expense of the Sheriff; if not, we should order him to return the full amount.]

*Sherlock*.

In a note to *Leader v. Danvers* two cases are cited: *Clarke v. Withers* (b) and *Cameron v. Reynolds* (c), which clearly show that such a return to a *venditioni exponas* is bad. The fine in this case ought to be made absolute; the *feri facias* issued in Michaelmas Term last, and yet the goods are still on hands.

PENNEFATHER, B.

You cannot make absolute the fine upon the Sheriff. It was a conditional fine for not returning the writ. He has returned the

(a) 1 Bos. & Pul. 360.

(b) 6 Mod. 292; S. C. 2 Lord Raym. 1075.

(c) Cowp. 406.

writ, though he has made a bad return. Let the Sheriff amend his return, by returning that he has sold goods to the full amount of the execution, and let him have three weeks to amend his return; and let him pay the costs of this motion and the costs of the conditional fine.

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v.  
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OF BALLIN-  
ROBE UNION.

HYNES v. SHANNONS.

June 7.

MACDONOGH (with whom was *F. Smith*) moved that the demurrer in this case be set aside as frivolous, and that the plaintiff be at liberty to mark judgment. It was a special demurrer to the declaration for want of venue, the only venue appearing being the venue in the margin. The defendant had paid money into Court before the declaration was filed; but notice of the lodgment of it was not given until after notice of the declaration.

A defendant cannot demur to a declaration upon a single cause of action, after having paid money into Court subsequently to the filing of it.

*B. Stephens*, contra.

This being a certified special demurrer, the Court will not call on me to argue it upon a motion of this kind. The payment of money into Court does not affect the pleadings. In 1 *Tidd's Prac.* p. 625, citing 2 *H. Bl.* p. 375, it is laid down, that "after payment of money into Court there may be a nonsuit, a judgment as in case of a nonsuit, a demurrer to evidence, or a plea *puis darrein continuance*; in short, that the cause goes on substantially in the same manner as if the money had not been paid in at all:" *Gutteridge v. Smith* (a).—[PENNEFATHER, B. It does not say that after payment of money into Court you can demur, and it is contrary to all principle; for by a payment of money into Court, the plaintiff

(a) 2 *H. Bl.* 375.

T. T. 1847. admits a good cause of action in every count in the declaration.  
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 SHANNONS. Instead of requiring an authority to show that a party cannot demur after payment of money into Court, you ought, I think, to show some authority that you can demur; that is, where money is paid in after declaration filed.]—Here the money was lodged before the declaration was filed, though notice of the lodgment was not given until notice of the declaration.

*Macdonogh.*

No authority for the position contended for at the other side has been found; if there be several counts in the declaration for different causes of action, the effect of lodgment of money is different from the present case, where there is but one cause of action; the defendant has in such case no right whatever to demur; for there is in the rule for the lodgment of money an order that the plaintiff may sign judgment for nominal damages in case the costs shall not be paid: *Kingham v. Robins (a)*; *Seaton v. Benedict (b)*.

PENNEFATHER, B.

I am quite of opinion that after lodgment of money, whether in an action on a special contract, or on an *indebitatus assumpsit*, you cannot demur; for the lodgment of the money is an admission of a good cause of action in the plaintiff to that amount.

*Stephens.*

Suppose the declaration to be faulty, your Lordship would in that case hold that the defendant could not move in arrest of judgment.—[PENNEFATHER, B. I would say that he could not.]—The defendant might bring a writ of error; the fact of the lodgment of money does not appear upon the record.

*Macdonogh.*

The way that objection is answered is this, the Court can restrain a party from bringing a writ of error where it is agreed

(a) 5 M. & W. 94.

(b) 5 Bing. 28; S. C. 2 M. & P. 66.

not to bring one; the rule for the lodgment of money amounts to an agreement not to bring a writ of error.

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PIGOT, C. B.

Let there be a *stet processus* entered; the defendants paying the costs up to the lodgment of the money.

*Macdonogh* prayed for the costs of the motion; and that the plaintiff might be awarded the costs incurred up to the filing of the declaration.

PIGOT, C. B.

The Taxing-officer will decide the latter question; let the officer tax the costs in the ordinary way.\*

ORDER :—Ordered that a *stet processus* be entered; and that the several sums of £50 and £10, lodged by the defendant under the orders of the 15th April and 3rd May last, be paid to the plaintiff in full discharge of this action; and that the defendant do pay the costs of this cause, properly incurred, up to the lodgment of said sum of £10; and no costs of this motion or of this cause subsequent to the said lodgment to either party.

\* RICHARDS, B., and LEFROY, B., were absent.

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*Exch. of Pleas.*

FRAZER v. MONTGOMERY.

June 7.

In an action by an engineer against one of the promoters of a Railway Company for services in furtherance of the undertaking, after notice of trial had been served and withdrawn, and witnesses examined under a commission, upon its being shown by affidavit that the necessity for such withdrawal arose from the opinion of Counsel, to whom a case for the advice of proofs on behalf of the plaintiff had been sent, and that the plaintiffs were in London at the time attending the examination of witnesses under the commission; the Court permitted the plaintiff to serve a further bill of particulars, upon terms of the defendant being at liberty to lodge such sum in discharge of the action as he may be advised, as of the date of his plea, with liberty to him to plead *de novo*, and to issue a new commission, and to examine the former witnesses, and such others as he might give the plaintiff due notice of.

In this case, which was an action brought against the defendant as a member of the Committee of the Great County Down Railway Company, for engineering services rendered by the plaintiff to the Company—

*Tomb* moved that the plaintiff be at liberty to proceed to trial at the Sittings after the present Term, notwithstanding the rule of the 15th of April last, that further proceedings in this cause be stayed until the costs of the notice of trial which had been served were paid; and also moved that the plaintiff be at liberty to serve a further and amended bill of particulars instead of the following, which had been originally served:—

|   |     |     |         |     |
|---|-----|-----|---------|-----|
| “1845.—To making Parliamentary plans and sections |     |     |         |     |
| of 104 miles of the Great County Down Railway,    |     |     |         |     |
| at £100 per mile,                                 | ... | ... | £10,400 | 0 0 |
| By payment on account,                            | ... | ... | 1400    | 0 0 |
| Balance due,                                      |     |     | £9000   | 0 0 |

The motion was grounded upon the affidavits of plaintiff and his attorney. The latter stated that the affidavit of the plaintiff therein after referred to did not reach town in time to enable him to apply for leave to serve an amended bill of particulars in time for a trial at the then next Sittings, in consequence of which he was obliged to withdraw his notice of trial; that a rule to stay proceedings until the costs of notice of trial were paid was obtained on the 15th of April; that on the 4th of May last he called on defendant's attorney to have the costs taxed and certified, and undertook to pay the same; that the costs were not served on the deponent until about the 19th of

May, and that no step was taken to tax and ascertain them until the 27th of May, when, though a gentleman from deponent's office attended, they were not taxed; that in consequence of the delay of defendant's attorney in taxing and ascertaining these costs, the trial of the issue was suspended; that on the 26th of May the following amended bill of particulars was served:—

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**GOMERY.**

“February to October 1845.

To work done by plaintiff for the Committee of the Great County Down Railway in the arrangement of the preliminary maps, plans, tracings and surveys; plaintiff's attendance on meetings in Ireland and England, and consultations with the members of the Committee, solicitors, making reports, laying down the lines of railway and the several branches, for the maps; altering same from time to time as suggested by the Committee; making the necessary levels, trial sections and surveys on the line of said railway and branches; arranging the taking of the traffic; time, trouble and expenses of several journeys to England; conferring with Mr. Rastrick and other engineers, and expenditure incident to

|                                       |          |       |   |
|---------------------------------------|----------|-------|---|
| the above,      ...      ...      ... | ...£3000 | 0     | 0 |
| By cash on account thereof,           |          | 100   | 0 |
|                                       |          | <hr/> |   |
|                                       | £2900    | 0     | 0 |

“Secondly—September 1845 to December 1845.

Parliamentary surveys, furnishing the several, to solicitors to enable them to prepare books of reference; taking the levels, furnishing tracings and copies of the plans and sections; laying out gradients and curves; finding engineers, surveyors and levellers; superintending all the departments of surveys, mapping, planning, levelling, engineering and engraving of the main line and several branches thereto; making sundry reports, and expenses

|   |  |       |   |   |  |  |  |  |
|---|--|-------|---|---|--|--|--|--|
| T. T. 1847.<br><i>Exch. of Pleas.</i><br>FRAZER<br>v.<br>MONT-<br>GOMERY. | incident thereto, travelling and office expenses |       |   |   |  |  |  |  |
|   | and charges, ... ..                              | £6000 | 0 | 0 |  |  |  |  |
|   | Received on account thereof, ... ..              | 1000  | 0 | 0 |  |  |  |  |
|   |  | £5000 | 0 | 0 |  |  |  |  |

“ Thirdly—30th November 1845 to 1st March 1846.

|  |  |       |   |   |  |  |  |  |
|--|--|-------|---|---|--|--|--|--|
| Journies to London ; attendance on committee, parliamentary agents, engineers and solicitors, consultations, &c., preparing and arranging the several notices to be served on the several owners, lessees and occupiers on the line and branches ; getting up evidence for standing orders in the committee of the House of Lords ; attendance on committee ; bringing witnesses from Ireland ; furnishing maps, plans, tracings and sections ; travelling and other expenses incident thereto, ... .. |  |       |   |   |  |  |  |  |
|  |  | £2000 | 0 | 0 |  |  |  |  |
| By cash received on account thereof, ... ..  |  |       |   |   |  |  |  |  |
|  |  | 200   | 0 | 0 |  |  |  |  |
|  |  | £1800 | 0 | 0 |  |  |  |  |

|   |  |      |   |   |  |  |  |  |
|---|--|------|---|---|--|--|--|--|
| The like expenses as to Dublin and Belfast Junction Railway and Newry and Enniskillen Railway, in reference to proposed alterations therein as connected with and instructed by the committee, and making sundry reports thereon ; attendance on committee and in Dublin on the several Companies, £400 0 0 |  |      |   |   |  |  |  |  |
| Deduct payment on account thereof, ... ..   |  |      |   |   |  |  |  |  |
|   |  | 100  | 0 | 0 |  |  |  |  |
|   |  | £300 | 0 | 0 |  |  |  |  |

“ 5th—August 1845 to 28th February 1846.

Inspecting the line of the Belfast and County Down Railway Company ; tracings of these lines and sections ; inspecting the line throughout and noting non-compliance with standing orders ; making sundry surveys, maps, tracings and sections in reference thereto, and ascertaining the several gradients and curves ; finding engineers, surveyors and levellers,

superintending the same and making out lists of non-compliance with orders, and other arrangements to oppose that line, by the directions of the defendant and committee; conference with the Counsel, Mr. Rastrick, parliamentary agents and solicitors, in reference thereto; travelling, office and other expenses incident thereto, ... £800 0 0

The like services in reference to the Dublin and Belfast

Junction Railway, ... 200 0 0

To paid for ordnance survey in reference to the

several undertakings, ... 237 0 0

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This bill of particulars the defendant's attorney declined to accept. The plaintiff's attorney further stated in his affidavit, that he believed the plaintiff could not safely go to trial without having the bill of particulars amended, and that he verily believed such amendment could in nowise prejudice defendant's defence to the action; the defendant being fully aware of the employment of the plaintiff, and of his performing the several matters mentioned in such amended particulars for the Great County Down Railway Company. The plaintiff in his affidavit stated, that the action was brought for engineering services in preparing a plan and surveys, and performing other duties as engineer of the Great County Down Railway Company, of which undertaking the defendant was one of the promoters; and for attendances, journeys, and expenditure by plaintiff and his assistants in respect thereof: and that when a case was sent to Counsel to advise proofs, he was advised that it would be necessary, in order to have a fair and proper trial, to apply for leave to amend the particulars; that a copy of Counsel's opinion was sent to London, where plaintiff and his attorney then were attending a commission which had issued in this cause for the examination of witnesses, when an offer was made to defendant's attorney that he (the plaintiff) should be allowed to amend his particulars, plaintiff consenting to enlarge the time for examining witnesses under the commission, and to place the record last in the list, to give defendant an opportunity of examining any further witnesses

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he might be advised to examine in reference thereto; and that the necessity of amending the particulars arose from the advice of Counsel referred to, and not from any thing which arose on the examination of witnesses under the commission in London.

*Fitzgibbon* and *Hutton*, contra, relied upon an affidavit stating that, in the month of January last proofs on behalf of defendant were advised by Counsel, on the assumption that the plaintiff's demand was confined to what was contained in the first bill of particulars which was served in November last; that notice of trial was served on the 28th of January, for the 5th of February, and withdrawn on the 4th of February; that if the new particulars were allowed, it would be necessary to obtain a new direction of proofs upon a new statement of facts, for that deponent had no doubt that if the new bill of particulars had been before Counsel he would have directed other and different proofs; and that there would not now be sufficient time to prepare for a trial at the Sittings after the present Term: *Hughes v. Dowd* (a); 2 *Ferg. Prac.* p. 863; *Anonymous* (b); *Blount v. Cooke* (c); *Staples and another v. Holdsworth* (d).

The Court made the following order:—

ORDER—That this motion, so far as same seeks for liberty to go to trial at the Sittings after the present Term, be refused; and that the plaintiff do pay to the defendant the costs under the said order of the 15th of April last; and that the said plaintiff be at liberty to serve a further bill of particulars of his demand, upon the terms of the said defendant being at liberty to lodge such sum in Court in discharge of the action as he may be advised, to be deemed a lodgment as of the date of the filing of the defendant's plea, such plea to stand unless the defendant shall desire to plead *de*

(a) 1 Cr. & Dix, 420.

(b) 6 Law Rec. N. S. 302.

(c) 2 Dow. P. C. N. S. 289.

(d) 6 Dow. P. C. 715; S. C. 4 Bing. N. C. 717.

*novo*, which he is hereby at liberty to do on or before the first day of July next. It is further ordered, that the said defendant be at liberty to issue a new commission to examine the witnesses already examined in this cause, and such others as he shall give due notice of to the plaintiff; such commission (if any) to be issued on or before the first day of July next, directed to the same Commissioner as the former commission, and to be returnable on the first day of next Term; and the plaintiff to pay the costs of this motion to the defendant.

T. T. 1847.  
*Each. of Pleas.*

FRAZER  
v.  
MONT-  
GOMERY.

O'BRIEN *v.* CHADWICK.

J. C. LOWRY, on behalf of the plaintiff, moved that he be at liberty to serve notice and go to trial, notwithstanding the order of November 1845 made in this cause, that the proceedings be stayed until the costs of a former trial were paid.—The defendant has been repeatedly called on in May 1846 to tax his costs; and also in the following June on one occasion his attorney did attend for the purpose, but not having the proper documents with him, the costs could not be taxed in consequence. If the plaintiff does not now obtain leave to serve notice of trial, it will be too late to do so.

*F. Meagher*, for the defendant, stated that a notice had been served by the defendant, authorising the plaintiff to proceed to trial if he pleased.

PIGOT, C. B.

Let the plaintiff be at liberty to serve notice of trial, upon giving an undertaking to pay the costs within four days after taxation.

Ordered accordingly; the defendant to pay the costs of the motion up to the service of his notice.

5 L

*June 7.*

Where proceedings having been stayed until the costs of a former notice of trial are paid, the defendant, though called on, neglects to tax his costs, the plaintiff will be allowed to serve a fresh notice of trial, upon giving an undertaking to pay the costs of the former notice within such time after taxation as the Court may direct.

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*Exch. of Pleas.*

STEWART, *Petitioner* ; DAVIS, *Respondent*.

June 7, 8.

J. B. S. was apprenticed to an attorney who was in partnership with the respondent, the covenants of the indentures being to serve the partnership, and the apprentice fee being paid by a bill of exchange drawn in the name of the firm and accepted by the apprentice's father; his master having died, the surviving partner claimed the benefit of the apprentice's contract, and refused, though he had himself no vacancy for an apprentice, either to deliver up the indentures or consent to their being assigned except to a person named by himself, unless he was paid a certain sum.

The Court, upon the petition of the apprentice's mother and guardian, ordered the respondent to deliver up the indentures in order to their being assigned, and it was referred to the officer to report how much of the apprentice fee should be refunded by the respondent, although it was stated upon affidavit that he had never received any portion of it.

T. K. LOWRY moved on behalf of the petitioner that the respondent be ordered to deliver up the indenture of apprenticeship of John Barnsley Stewart to the petitioner, without the payment of the sum of £100 demanded, as in petition stated by the respondent, or any part thereof, and to give his consent to the assignment of the said John Barnsley Stewart's indenture of apprenticeship to John Suffern, gentleman, one of the attorneys, in case the Benchers of the Honorable Society of King's Inns shall permit him to take such assignment; and that it be referred to the proper officer to ascertain and report how much of the sum of £195, paid to the co-partnership of James and William Davis as an apprentice fee with the said John Barnsley Stewart ought to be refunded, and that the same may be accordingly refunded by the said respondent to the petitioner, as the mother and guardian of the said John B. Stewart, in order to be applied by her in payment of the fee required on such assignment.

It appeared that on or about the 29th of April 1846 articles of apprenticeship were executed, whereby John Barnsley Stewart was bound to James Davis, one of the attorneys, to serve him and his co-partner, the respondent in this matter, for five years; that there was paid by Robert Stewart, father of the apprentice, to the firm of James and William Davis, on the execution of the indenture, an apprentice fee of about £195; that Robert Stewart, father of John B. Stewart, died about the 19th of June last, leaving the petitioner his administratrix (and to whom administration was granted) guardian of his son; that at the time of J. B. Stewart's being bound, James Davis had, as petitioner believed, two other apprentices, and William Davis the respondent had also two apprentices. It

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*Exch. of Pleas.*  
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appeared also that on or about the 20th of March last James Davis died, and that shortly after his death the petitioner called on the respondent relative to her son's apprenticeship, when he informed her that he would assign her son as an apprentice to a gentleman, an attorney residing in Dublin, named Cusack, whom she had never before heard of; she at once stated she would not consent to this, and requested William Davis to consent to her son being assigned to another attorney or house, when he stated he would not allow her son to be assigned to any other attorney unless she paid him £100 in addition to the £195 already paid to the co-partnership.

The petition also stated that petitioner had applied to John Suffern, gentleman, of Belfast, one of the attorneys, who had consented to take her son for the remainder of the term of five years, on payment of a fair proportion of the sum of £195 paid to the co-partnership as an apprentice fee. The respondent, in answer to the petition, filed an affidavit, in which he admitted the binding of John Barnsley Stewart as alleged in the petition, except that the consideration money was expressed on the face of the indentures to be £200, and admitted the fact of James Davis having at the time two other apprentices, but denied that he himself had more than one when Stewart was bound to his brother; he stated also, that he never received one shilling of the apprentice fee of John Barnsley Stewart, or of any of the other apprentices bound to James Davis, as it was the express agreement between him and James Davis that all apprentice fees and all profits connected with the Belfast business should be paid and belong to James Davis alone, James Davis residing permanently in Belfast, and the deponent residing in Dublin, and being as to James Davis's Belfast business more in the character of an agent or correspondent than a partner; and that under the terms of the agreement between the deponent and James Davis, deponent was only to be entitled to the fees of any of the apprentices who should be bound to the deponent, and should serve the entire of their time to deponent in Dublin; and that he was not to have any share in the profits of the business belonging to the Belfast office, but only to be repaid

T. T. 1847. such necessary outlay as he should be obliged to make in relation  
*Esch. of Pleas.* to the business of the Belfast office.

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That J. B. Stewart did not, for the first time, enter the office of James Davis on the execution of the indentures of apprenticeship; but that from the 11th of November 1844 he acted in the office as an apprentice, having an opportunity of receiving the same instructions as the other apprentices, and which he believed he did receive, and that he continued so to act until the 5th of February 1845, and afterwards from the 24th of March 1846 until the 2nd day of April last, when he left the office without permission or giving any intimation of his intention. The affidavit further stated, that deponent's brother James Davis having died on the 20th of March last, leaving a widow and seven children, all under twelve years of age, deponent thereupon made arrangements to reside in Belfast and carry on the business there.

That on the 13th of March last Mrs. J. Henderson and Miss J. B. Henderson, the grandmother and aunt of John B. Stewart, called on him and inquired what he was going to do with the apprentices who were bound to James Davis; upon which he informed her that he had made arrangements, when in Dublin, to have two of them assigned, but that they should remain in the office with deponent; and that as soon as he could, he would have them re-assigned to himself, as he was most anxious and willing to have all the apprentices sworn and admitted under himself; and that such arrangement appeared to give satisfaction to them (Mrs. Henderson and Miss Henderson).

That on the 6th of April last the petitioner, accompanied by Miss Henderson, called on deponent respecting John B. Stewart's apprenticeship, when he repeated what he had before stated to Mrs. Henderson; upon which Mrs. Stewart said she would not allow her son to remain with deponent, and that her mother had no authority from her on the subject, at least upon that occasion; and upon another interview about the 9th of April, he stated he would speak to his brother's executrix on the subject of J. B. Stewart's removal from the office.

The deponent further stated that, from the length of time which

J. B. Stewart was in his brother's office, and the pains taken to instruct him in his business, he conceived there should be some consideration given to the executrix of his brother, and for his brother's children, for giving up his indentures or the assignment of them; and that acting on that belief he had stated to the petitioner that if £100 were given for the benefit of James Davis's minor children, his (J. D.'s) executrix would at once consent to the assignment of the indentures; and also that he had received no notice of the intention of petitioner to apply to the Court.

An affidavit was made by Mr. Suffern, stating that at Mrs. Stewart's request he had consented to take her son as an apprentice for the remainder of the term in his indenture, on being paid a proportion of the fee; and that he accordingly wrote to Mr. Wm. Davis enclosing a consent that the indenture should be assigned to him, and requesting Mr. William Davis to have it signed by the executors of the late Mr. Davis, and returned; in reply to which he received the following letter:—

"DEAR SIR—Previous to giving any reply to your note of the 20th, or applying to the executors of my late brother on the subject of the consent furnished by you, I wish to be informed upon what terms Mrs. Stewart wishes to take her son out of this office, and from me, as surviving partner, to whom he was also bound to serve.—Yours truly,

"WILLIAM DAVIS.

"29th April, 1847."

In reply to which Mr. Suffern wrote on the 1st of May, stating that there could be "no difficulty on the score of terms, which, as usual, will be as follows: if five years pay £200, what should ten months pay? or in round numbers, Mrs. Stewart, on behalf of her son, will require a return of £160 odd of the premium paid."

To this communication he received the following answer:—

"1st May, 1847."

"DEAR SIR—In reply to yours of this date, you omit to answer the latter part of my note of the 29th ultimo. Mrs. Stewart's son was bound to serve me as well as my brother. I made every arrangement previous to the first day of Term, and without my consent he left the office. On the part of the executors and my

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T. T. 1847. "brother's children, I cannot entertain the proposition contained in  
*Each. of Pleas.* "your note. I am not aware that even if the consent were signed  
 STEWART "before three o'clock to-day, that you could do any thing with same  
 v. "before next Term.—Yours truly, "WILLIAM DAVIS."  
 DAVIS.

The affidavit further stated that deponent had been for some years transacting business with the firm of James and William Davis in Belfast, previous to the death of James Davis; and that James and William Davis carried on business in Belfast under the firm of "James and William Davis;" and that deponent always considered William Davis as a full partner in the house; and that the correspondence of the office in Belfast was carried on in the names of James and William Davis; and that since the death of James Davis he had been transacting business and corresponding with William Davis, and that the letters received from William Davis in Belfast are still signed by him with the firm of James and William Davis; and that he continued to carry on business in Belfast under the firm of James and William Davis. The affidavit of John Barnsley Stewart stated, amongst other things, that although on the face of the deed a sum of £200 was stated as the consideration, that that was not the sum actually paid by his father to the firm; but that a bill of exchange was drawn by and in the name of James and Wm. Davis, and accepted by his father Robert Stewart at nine months date for £200 payable to said James and William Davis, or order, and which bill became due on the 1st day of February 1847; but that on or about the 18th of June 1846, deponent, by direction of his father, retired said bill of exchange, and a discount for cash of £6. 1s. 4d. being deducted, the cash payment actually made through deponent to the firm was £193. 18s. 8d.; that on the 2nd of April last, one Henry Grier, a clerk in the office, brought him a document which he informed him William Davis required him to sign; that on reading the document he found it purported to be a memorial from him (J. B. Stewart) to the Benchers of the King's Inns, praying them to allow him to be assigned as an apprentice to an attorney in Dublin, named Thomas Cusack, with whom he had no acquaintance whatever; which document deponent returned, stating he would not sign any paper or document without the approval or consent of

his mother; and shortly afterwards, on same day, Grier told him William Davis had stated that his (J. B. Stewart's) signing the document was a mere matter of form; that upon his return home he informed his mother, who directed him not to go back to the office, being indignant at Davis's endeavouring to get him to sign a document binding himself to a strange attorney without her consent. Deponent also corroborated the allegation in Mr. Suffern's affidavit of William Davis having acted as a partner with James Davis, and stated that he was so considered in the office; and that no agreement such as mentioned in his (William Davis's) affidavit as having been entered into between him and James Davis as to fees or profits was known to deponent, nor as he believed to any one in the office except the said firm.

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*Each. of Pleas.*  
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The indenture of apprenticeship was made between "James Davis, &c., Great Brunswick-street in the city of Dublin, and of Belfast in the county of Antrim, gentleman, one of the attorneys, &c., &c., partner with William Davis of same place, attorney and solicitor," and John Barnsley Stewart of the second part, and Robert Stewart father of John Barnsley Stewart of the third part.

It stated that the said J. B. Stewart bound himself apprentice or clerk to James Davis "to serve him and his said co-partner," and the covenants in the indenture were to serve "James Davis and his said co-partner as his and their apprentice;" and throughout the indenture the covenants entered into by the apprentice were to serve, obey and keep the secrets, &c., &c., of James Davis and his co-partner.

*T. K. Lowry.*

Mr. Davis admits that he has the full number of apprentices, and therefore he cannot take this gentleman; yet he seeks to obtain £100 for consenting to the assignment of his indentures; with reference to that portion of the petition which seeks that a part of the apprentice fee shall be refunded, he says in his affidavit that by the terms of the agreement between him and his partner he was only to receive the fees of the apprentices bound to himself; and by his letters in answer to Mr. Suffern's application that he should consent

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to the assignment of the indenture, he says that the apprentice was bound by his contract to serve him as well as his deceased partner.—[PENNEFATHER, B. Surely Mr. William Davis cannot be, with reference to this young gentleman, in a better position than the personal representative of Mr. James Davis.]—In the case of *Ex parte Bayley* (a) the Queen's Bench in England made such an order as we seek. In that case Bayley was articulated to Watson, of the firm of Watson and Harper, but acted as clerk to both partners for about two months, when Watson died; during that period each partner had two articulated clerks. A reference was made to the Master, who reported that the money had been received by Harper and placed to the partnership; and the Master reported that he ought to refund £180, although it appeared by affidavit that the money had been set off by Mr. Harper against Mr. Watson's private account, Mr. Watson being indebted in £1500 to him; and this report was confirmed, Lord Tenterden observing:—"This case is not to be decided by any "strict rule of law. The Court exercises a jurisdiction over "attorneys, and that is to be exercised according to law and con- "science, and not by any technical rules; and considering the "circumstances of this case, and the effect of the Act of Parlia- "ment which prohibits attorneys from having more than a certain "number of clerks, we think that the report should be confirmed. "This clerk was bound to one only in *name*, but in *reality* to the "two; he was to be instructed by the two, who were in partnership "together, and they caused him to be bound to one instead of bind- "ing to the two, in order to satisfy the Act of Parliament, and enable "the parties to have that number of clerks which they could not "otherwise have had if Bayley had been bound to the two instead "of one of them. In conscience it appears to me to be a binding "to the two; the premium was paid to the two, and the one being "dead and the other having the full number of clerks which the law "allows him, and not being able to retain this young man in his "service, and instruct him and give him the benefit for which he

(a) 9 Bar. & Cress. 691.

"paid the money, I think he who is the survivor is bound to refund  
"whatever is to be refunded. The Master has found the sum £180  
"is to be refunded, and I am not prepared to say that he is wrong.  
"The Master's report must be confirmed." The present case is still  
stronger, as the apprentice was by the indenture actually bound to  
serve both; and the bill of exchange taken for the apprentice fee  
was drawn and endorsed in the name of the firm; and upon the  
authority of that case we seek a reference to the Master to report  
what portion of the fee ought to be returned.—[Pigot, C. B. How  
long has this gentleman served?]

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*Butt.*—He has served since the 29th of April 1845.

*Lowry.*

In *Ex parte Bayley*, though the surviving partner had given  
credit for the entire amount of the fee to the deceased partner, who  
was indebted to him, still the Court obliged him to refund. The  
present therefore is a stronger case against the surviving partner.

*M. Gibbon and Francis Fitzgerald, contra.*

Mr. Davis in his affidavit states that he has never received one  
shilling of the fee with this apprentice; that he has never had any  
of the Belfast business, and acted as regarded it more as a Dublin  
agent; and that as regards the Dublin business, he was a partner.  
It has been alleged that a sum of £200 was given as a fee for this  
young gentleman to James Davis; but it is sworn none of it came to  
Mr. William Davis's hands.—[RICHARDS, B. The covenant in the  
indenture is by James Davis, that he and his co-partner shall teach  
the apprentice his business.]—It would be very hard, that where  
Mr. William Davis has never received any of the fee which was  
paid, that he should be called on to refund; the application ought  
to be against Mrs. Davis, the widow of James Davis.—[Pigot, C. B.  
Do you show that Mr. William Davis is now carrying on the busi-  
ness for the benefit of the representative of James Davis?]  
In *Ex parte Lewis (a)*, it appeared that Mr. Lewis, who had been

(a) 2 Dow. & Lou. 130.

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articled to a Mr. Chilton, was assigned to an attorney named Jones, who was in partnership with a Mr. Morris. Jones died intestate, and Mr. Lewis continued to serve Morris; but upon an application being made that he might be admitted on that service, or that, as he was of age, he might be allowed to bind himself to any attorney that he pleased, the Court refused the first part of the application, but granted a rule calling on Mrs. Jones, who was a minor, and had not taken out administration to her husband, to show cause why he should not enter into articles to Mr. Morris, or any other attorney he pleased, for the remainder of the term. The respondent has sought certainly to get £100 for assigning the indenture, but it was only for the minor children.—[PIGOT, C. B. He has not the slightest pretence for seeking to get £100 for inducing the widow of Mr. James Davis to do her duty; it is impossible to justify it.]

PIGOT, C. B.

We are of opinion that in this case Mr. William Davis is bound to consent to the assignment of these indentures, and that a reference ought to be made to the officer as to the refunding part of the fee received by Mr. James Davis. It appears that the contract of apprenticeship was made in the ordinary form in such cases; namely, it was made in the name of one of two partners, one only being by law competent to take the apprentice. The fee was paid by a bill of exchange drawn and endorsed in the name of the firm. The contract was for the benefit of both partners. It has been stated by the respondent in his affidavit, that he never received any portion of the fee. If the question rested there, it might be a question whether where the benefit was confined to one partner upon this instrument, such a liability could arise as that the other surviving partner should be ordered to refund a part of the fee; but the letters written by Mr. William Davis and the circumstances which have occurred since Mr. James Davis's death appear to me to have removed any difficulty of that description; there has been a clear adoption and assuming of the contract by Mr. William Davis for his own benefit. It is impossible to hold that a surviving partner can be allowed to say that he shall participate in the benefit without also participating in the liabilities of the partnership.

This was a partnership conducted as most are, one partner residing in a populous town in the country, and the other in town (Dublin); both take a share in the apprentices bound to each; one partner dies, then the other partner becomes the owner of the entire concern, taking the benefit of, what may perhaps be the most beneficial portion of the partnership property, the depending suits; he therefore must take the benefit *cum onere*, and therefore, with regard to the liability to refund a portion of the fee taken on the apprenticeship of the son of the petitioner, it is but just that he should bear the burthen, if the officer should hold that it ought to be refunded. It appears to us—considering, therefore, the letters of Mr. William Davis clearly and plainly adopting the contract of the apprentice to serve both partners—that this application must be granted; we think it right that the widow, the personal representative of Mr. James Davis, should have notice of the reference before the officer, as something might occur affecting her interests.

T. T. 1847.  
*Each. of Pleas.*  
STEWART  
v.  
DAVIS.

We shall make the order in the first instance, that the respondent be ordered to assign the indentures immediately, in order that the young gentleman may not lose any more time; and then, that a reference as prayed be made to the officer to report whether any and what portion of the fee shall be refunded.

*Butt* prayed for the costs of the motion.

FRIGOT, C. B.

It appears to us, that after what Mr. Davis has done, after his seeking to obtain £100, whether for himself or for others (the family of his deceased partner), and his defence being so inconsistent with his letters and his conduct, and the representations made by him to members of the apprentice's family, that he ought to pay the costs of this application.

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The Second Remembrancer having reported that the sum of £150 ought to be refunded by the respondent—

T. K. Lowry moved that the report of W. T. Hamilton, Esq.,

Nov. 5.

Dec. 7.

T. T. 1847. *Exch. of Pleas.* the Second Remembrancer in this matter, bearing date the 5th of November, be confirmed, and that the respondent may be ordered to pay to the petitioner the sum of £150, being the proportion of the apprentice fee to be refunded by the said William Davis to the petitioner, together with the costs of the reference under the order of the 8th day of June last, and report thereunder, and of this application, when taxed and ascertained, the order of the 8th of June, and report of the Second Remembrancer.

STEWART  
v.  
DAVIS.

*W. M. Gibbon* appeared for the respondent.

The Court granted the motion.

### STRETTLE v. MORPHY.

*June 8.*

In an action upon a judgment of 1834, in which issue was joined in 1842, but proceedings were stayed until 1846 at defendant's request, under promises that he would settle the demand, the plaintiff was allowed to proceed to trial upon giving a Term's notice. This was a motion for liberty to proceed, notwithstanding the time which had elapsed since the last proceeding in the cause. It appeared that it was an action brought upon a judgment of 1834, against the defendant as executor; that in Michaelmas Term 1841, the defendant pleaded *plene administravit*; and, in Hilary Term 1842, notice of trial was served, which was not acted on, and from November 1842 up to 1846, many letters on behalf of the defendant were written praying the plaintiff to stay proceedings, and promising to settle the demand, which however was not done.

*J. F. Townsend*, in support of the motion.

In *Daly v. Kelly* (a), the plaintiff was allowed to proceed though

(a) 2 Ir. Law Rep. 209.

more than six years had elapsed since issue was joined; the only reason given for the delay being that the plaintiff was a pauper: *Connor v. Blake* (a); *Moroney v. Danaher and wife* (b). The sum of £400 is still due.

T. T. 1847.  
*Each of Pleas.*  
STRETTLE  
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*Orpen*, for the defendant, objected that a Term's notice ought to have been given.

PENNEFATHER, B.

It is an action on a judgment of 1834, which therefore could not be barred; we shall give the plaintiff liberty to proceed, upon giving a Term's notice.

(a) 6 Ir. Law Rep. 341.

(b) 5 Ir. Law Rep. 562.

# MORRIS v. M'CORMICK.

June 8.

R. C. WALKER, and *Codd*, moved that the parliamentary appearance, declaration and all subsequent proceedings in this case be set aside, on the ground that there was no affidavit filed verifying the service of the writ of *capias* upon which they were founded. There was an order obtained that the service had be deemed good service, but there was no affidavit verifying that service which was effected by the process-server.—[LEFROY, B. Surely there must have been an affidavit verifying the service which was deemed good.—PIGOT, C. B. Does the section of the Act 43 G. 3, c. 53, s. 7, apply? It provides—"That no plaintiff shall enter a common appearance, or "file common bail for any defendant, unless the plaintiff or his attorney, or the attorney employed for the purpose of having the process "personally served, shall make an affidavit in writing that such

*Semble*—That where there has been by an order of the Court a substitution of the service of a *capias ad respondendum* it is not necessary that an affidavit should be filed verifying the service originally effected by the process-server. And at all events it is irregular to apply to set aside the subsequent proceedings for want of such affidavit, without first seeking to set aside the order for the substitution of service.

ing to set aside the order for the substitution of service.

T. T. 1847. "plaintiff or attorney (as the case may be) knows the person so  
*Exch. of Pleas.* "swearing to such service, and that such plaintiff or attorney (as  
 MORRIS "the case may be) believes that such process has been *personally*  
 v. M'CORMICK. "served on the defendant at such time as such person shall have  
 "sworn to." Is that possible to be sworn where there has been an  
 order of this kind made?—That is not the section upon which  
 we rely; the 8th section provides—"That whenever it appears  
 "to the Court out of which the process issues that all due diligence  
 "has been used to have the process of the Court personally served,  
 "yet that under the special circumstances of the case appearing  
 "to the Court by the affidavit of the plaintiff, or his attorney, or  
 "the attorney employed for the purpose of having the process  
 "personally served, that it was impossible to procure personal  
 "service; that then and in such case it shall and may be lawful  
 "for the Court out of which the process issues, to substitute such  
 "other kind of service as to them shall seem fit." We submit  
 that the Court in all cases require a verifying affidavit.—[PENNE-  
 FATHER, B. The verifying affidavit is by the attorney, stating that  
 he believes the person has been personally served. Now, how can  
 that affidavit be made here where there is a substituted service?—  
 PIGOT, C. B. The 7th section of the statute makes it necessary to  
 state in the verifying affidavit that which cannot be stated where  
 the application is that the service had be deemed good service.  
 There is an order of the Court to deem the service in this case good  
 service, which order is not in violation of the statute, and you do  
 not come in to set aside that order of service.]—It is strange that  
 in the one case the protection of a verifying affidavit shall be given  
 to the defendant, and that in the other it shall not. This is an  
*a fortiori* case to an ordinary case.—[PIGOT, C. B. You do not  
 apply to set aside the order that the service had be deemed good.]—  
 No; but if the proceedings be set aside the order falls to the ground.  
 The present application goes to the root of the case: *Stewart's*  
*Practice*. It would be doing away with the main protection of the  
 statute if the Court decide that in a case of this kind it is not  
 necessary to file a verifying affidavit.

**PIGOT, C. B.**

There is an order of the Court adjudicating that the service had in this case shall be deemed good service.

**T. T. 1847.**  
*Each. of Pleas.*

**MORRIS**

**v.**

**M'CORMICK.**

**PENNEFATHER, B.**

And you do not come in to set aside that order.

**LEFROY, B.**

You are seeking to overrule an order of the Court; you must first get rid of that order. It is a universal rule that you cannot go behind an order of the Court in that way.

Motion refused.

**MORRIS**

**v.**

**MICHAEL SCULLY, PETER SCULLY and — SCULLY.**

**June 8.**

**R. C. WALKER** moved that the parliamentary appearance, entered for the several defendants in this cause, the declaration filed thereon, and the rules to plead, be set aside with costs.

It appeared that the three defendants having been included in the *capias*, there was, as regarded two of them, no affidavit of service; but notwithstanding, the plaintiff entered a parliamentary appearance for them, and filed a joint declaration against all three.

**Codd** appeared for the defendant who had been served, and insisted that the proceedings were irregular, even as against him.

**J. O'Driscoll, contra.**

Parliamentary appearances were no doubt entered for, and a joint

Where there being no affidavit of service of process upon two of three defendants, who had been included in the same *capias*, and yet the plaintiff entered parliamentary appearances for them, and declared jointly against all three; the Court refused to set aside the proceedings, but ordered the declaration to be amended by striking out the names of the parties who had not been served.

T. T. 1847.  
*Exch. of Pleas.*

MORRIS  
v.  
SCULLY.

declaration filed against, all the defendants; but the first intimation which the defendants' attorney had of any irregularity in the service of the process was the receipt of the plaintiff's notice of the motion, which was framed in the alternative, either that proceedings against all the defendants should be vacated, or that the names of the two defendants who it was alleged were not duly served with process should be struck out. The defendants' attorney, by a notice in reply, offered to amend the declaration by striking out the defendants' names, upon the terms required. This, however, the plaintiff's attorney declined to accede to, claiming a right to select which of the alternatives he would accept.—[PIGOT, C. B. And you did not then amend the declaration.]—It was thought better to await the result of the motion, the Court having, in *Loughnane v. Irwin* (a), expressed an opinion on the impropriety of altering a record pending a motion on the subject. We had an undoubted right to select either of the alternatives in the plaintiff's notice, and promptly accepted that which met the justice of the case. It is well settled that a *capias* may contain the names of several defendants: 1 *Ferg. Prac.* pp. 127, 128; and a declaration may be filed against one of them only: *Crawford v. M'Donnell and others* (b). The parties here also have not changed the parliamentary attorney: *Taylor v. Lyon* (c).

*Codd.*

By permitting this declaration to stand against the third defendant, he will be deprived of the privilege of pleading in abatement.

PIGOT, C. B.

This motion must be refused with costs; the plaintiff to be at liberty to amend the declaration in the terms of his notice; the plaintiff paying the defendant the costs up to that notice of the 28th of May; the defendant paying the costs incurred since then, and the costs of the motion.

(a) 4 Ir. Law Rep. 19.

(b) 5 Bing. 333; S. C. 2 M. & P. 586.

(c) 5 Bing. 333.

T. T. 1847.  
*Exch. of Pleas.*

DOOLAN v. EGAN.

June 8.

R. C. WALKER moved that the Sheriff be ordered to amend his return to the writ of *feri facias* in this cause, by specifying the goods which he had seized.

That the Sheriff has seized all the goods of the defendant in his bailiwick, without specifying their nature or value, is a bad return to a *feri facias*.

The Sheriff has returned that he has seized all the goods of the defendant in his bailiwick, without specifying what they are or their value; the plaintiff's attorney has served him with a consent that he should amend his return, to which he has not attended.

PIGOT, C. B.

Let him amend the return and pay the costs of this motion.

MURRAY v. LOWRY AND GARRETT.

June 8.

In this case, which was an action of trespass for false imprisonment—

T. O'Hagan moved that the rule for judgment upon the demurrer in this case be set aside, and that the said demurrer be also set aside; and that the defendant be at liberty to mark judgment as in case of a nonsuit.

The Court refused, with costs, an application to set aside a demurrer taken after nearly twelve months had elapsed, and a rule for *non pros.* had been entered to a plea, on the ground that to a declaration in trespass against two, they pleaded jointly that they were "not guilty," without adding "nor either of them."

The defendants having filed a joint plea of not guilty, the plaintiff has demurred specially, on the ground that the defendants have merely averred by their plea, that "they are not guilty," without adding the words "nor either of them." This proceeding is vexatious; the defendants were obliged to enter a rule for

T. T. 1847. *non pros.*, and the demurrer has been filed after a lapse of nearly  
*Exch. of Pleas.* twelve months.

MURRAY

v.

LOWRY.

*Close*, with whom was *Fagan*, contra.

The motion is wholly untenable. The defendants take away the ground under themselves; they have taken out a copy of this pleading to which they object; they have filed an informal plea, on which the plaintiff could not safely go to trial.

[Counsel being about to show the invalidity of the plea, were stopped by the Court.]

PIGOT, C. B.

If you argue the demurrer now, we will conclude you by it. The defendants seek here to get rid of a demurrer, by bringing forward a motion which is wholly untenable. The long affidavits which have been filed were perfectly unnecessary. On that ground alone I should be disposed to say the motion ought to be refused with costs. The defendants might have applied for judgment as in case of a nonsuit, before the demurrer was filed.

Motion refused, with costs.

### SAMUELS v. ATKINSON.

June 10.

Where a party pleads and demurs at the same time to the same count, the demurrer is overruled by the plea, and will be struck out.

B. STEPHENS moved that the demurrer which had been filed in this case to the second count in the declaration be expunged, the defendant having also pleaded to the same count.

*D. M'Dermott*, contra.

The pleading to this count was a mere clerical error. It is an action on a bill of exchange; the declaration containing several

special counts, averring want of notice, and giving a reason why there was no notice ; by mistake a plea to this count was filed.

T. T. 1847.  
*Exch. of Pleas.*  
SAMUELS  
v.  
ATKINSON.

*Stephens.*

The demurrer is, that it does not appear by any thing therein, that the Mary Atkinson mentioned in the commencement of the declaration is the Mary H. Atkinson afterwards mentioned.

PENNEFATHER, B.

It does not at all go to the merits of the case. Let the demurrer be set aside, the pleading overrules it.

*M'Dermott.*

That is overruling an objection which has been held good in the cases in England.

PIGOT, C. B.

We are not overruling the demurrer ; we are only holding that the pleading overrules it.

Demurrer set aside.

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MOONEYS v. PURCELL.

June 11.

JAMES PLUNKET moved to set aside the parliamentary appearance and subsequent proceedings in this cause, upon the ground that the process-server, which stated that he personally served the defendant with a writ of *capias ad respondendum* dated the 1st of February 1847, returnable the 17th of February 1847, with a notice at foot directing the defendant to appear at the return thereof, being the 17th day of April 1847 ; the Court set aside the parliamentary appearance and subsequent proceedings, upon an affidavit by the defendant " that he was not served with any process in this cause by J. M. the process-server, or by any other person, and never knew of the institution of this suit until the Sheriff of the Queen's County entered his house and seized his goods and chattels at the suit of the plaintiff."

Where the only affidavit of the service of the writ was that of the process-server,

T. T. 1847.  
*Exch. of Pleas.*

MOONEYS  
 v.

PURCELL.

defendant was never served with process in this cause, and that the writ mentioned in the affidavit of the process-server was illegal and void, being made returnable on a day out of Term, and on a day different from that specified in the notice at foot of the writ. The affidavit of the process-server recited that a writ had issued against the defendant at the plaintiffs' suit tested the 1st February 1847, and returnable the 17th of February 1847 (in point of fact such a writ had issued tested 1st of February 1847, returnable the 17th of April 1847), and proceeded to state that there was pursuant to the statute at foot of the said writ a notice to the defendant calling on him to appear "at the return thereof, being the 17th day of April 1847, in "order to your defence in this action—James Dillon Meldon, attorney "for the plaintiff, No. 14 Upper Ormond Quay, Dublin; as by the said "writ or process, and the said notice at the foot thereof and here- "unto annexed may appear." The affidavit then stated that on the 17th day of April the deponent personally served the defendant, by delivering to and leaving with him in person in his dwelling-house a true copy of the said writ or process, and of the said notice, and at the same time showing to the said defendant "the original writ or process, and the notice at foot thereof."

The defendant's affidavit stated that he "was not served with any "process in this case by James Moore or by any other person, and "never knew or heard of the institution of this suit, until the Sheriff "of the Queen's County entered deponent's house and seized his "goods and chattels under an execution at the suit of the plaintiffs."

*Patrick Blake, contra.*

The defendant, to entitle him to set the proceedings aside, ought to swear also that the writ never reached his hands; it is not enough to say that he never was served: and where there is an affidavit of service the Court will not act upon a contradictory affidavit.—[PENNEFATHER, B. But there is no contradictory affidavit, for the process-server's affidavit is an affidavit of the service of a void process.]—There ought to be a distinct denial by the defendant of his having had notice of the writ: *Lewis and others v. Henry (a)*;

(a) 6 Ir. Law Rep. 218.

*Clayton v. Phillips* (a); *Esdale v. Davis* (b); *Herbert v. Darley* (c); *T. T. 1847.*  
*Anonymous* (d)—[PENNEFATHER, B. What evidence have we of *Esch. of Pleas.*  
any writ having ever been served? Could the process-server be pro- **MOONEYS**  
secuted for perjury upon this affidavit? The process-server says that **v.**  
he served a certain writ with a notice at foot thereof, as by the said **PURCELL.**  
writ or process, and the said notice at the foot thereof and hereunto  
annexed may appear. Now is that good service? I think we  
ought not to make such a precedent.]—There is no allegation that  
the writ is void, it is a mere irregularity; and the Court will at all  
events impose on the defendant the terms of not bringing any  
action: *Kenworthy v. Peppia* (e).

PENNEFATHER, B.

Let the execution be set aside, the defendant undertaking not  
to bring an action.

(a) 3 Jur. 42.

(b) 6 Dow. P. C. 465.

(c) 2 Chit. Rep. 356.

(d) 4 Dow. P. C. 726.

(e) 4 B. & Ald. 288.

# HARRISON v. KENNY.

June 11.

M. BARRY moved that the declaration in this case be set aside, it  
having been received by the officer without the signature of Counsel.  
A consent has been tendered that the plaintiff be at liberty to amend  
the declaration by adding Counsel's name to it, and it is stated that  
the omission was a mere clerical error; but there is no certificate  
of Counsel that he omitted to sign it; if there was a certificate of  
Counsel that the declaration had been laid before him and that he  
had omitted to sign it, it would be almost a matter of course to allow  
the amendment.—[PIGOT, C. B. What is the nature of the decla-  
ration?—It is upon a bill of exchange.—[PIGOT, C. B. Do they  
The Court  
will not allow  
a declaration  
to be amended  
by adding  
Counsel's sig-  
nature to it  
unless it is  
satisfactorily  
shown that the  
draft was sub-  
mitted to Coun-  
sel, and that  
he by mistake  
omitted to  
sign it.

T. T. 1847. appear at the other side?]  
*Exch. of Pleas.*—We have served notice of this application. There is no appearance for the plaintiff upon the motion.

HARRISON

v.

KENNY.

PIGOT, C. B.

We shall certainly make an order to set the declaration aside; for in the first place the party does not appear, and next, if he did appear we should require to be satisfied that the draft had been submitted to Counsel, and that he had omitted by mistake to sign it.\* We shall therefore give a conditional order to set the declaration aside, with costs.

Cause to be shown in Chamber.

[The declaration was subsequently amended by consent of the defendant, the plaintiff paying all costs necessarily incurred in consequence of the omission.]

\* See on this subject the case of *Loughnan v. Irwin* (4 Ir. Law Rep. 19, C. P.)

### COATSWORTH v. WILLINGTON.

June 11.

In an action upon a bill of exchange, where the plaintiff was not to be found, and was not known at the place mentioned by his attorney as his address; and it was sworn that he was a mere nominal plain-

tiff, and no mark for costs; the Court, upon motion, ordered the proceedings to be stayed until security was given by the plaintiff for the costs already incurred and to be incurred, and ordered the plaintiff's attorney to pay the costs of the application.

THIS was a motion to make absolute the conditional order of the 24th of May, that the plaintiff in this case, which was an action upon a bill of exchange, be compelled to give security for costs, and that his attorney pay the costs of the motion, and that proceedings be stayed in the meantime.

*Rollestone*, in support of the motion, relied upon an affidavit which stated that on inquiry being made concerning the plaintiff at the

place given by his attorney as his address, the deponent was told by a person coming out of the house that there was no such person there; that he then asked a boy in the house if Mr. Coatsworth lived there; that he at first said "no," but then said "yes"; that he was told to say "that Mr. Coatsworth did live there:" it was also sworn that a woman who was coming out from the house told the deponent that she did not know of any person being there, that the house was the property of one Buckley a billiard-marker. It was also sworn that Coatsworth was a mere nominal plaintiff, and that in the event of the case going to trial he would be no mark for costs, and that the holder of the bill was one Cannon, who kept a gambling-house and was now a bill discounter; and on the part of the acceptor of the bill it was sworn that the bill upon which the action was brought had been renewed, and that the renewal was paid; but that the acceptor had not got up the original bill upon which he was now sued, and that no less than six actions were brought upon it, and that the bill the subject of the present action was fraudulently kept back, and that nothing was due upon it. Athlone, and 12 Essex-street, Dublin, were given by his attorney as the plaintiff's residence. Coatsworth, in his affidavit, describes himself as of Peamount, County Kildare, and 12 Essex-street, Dublin, and states that the bill is his property, and that he was not instigated by any one to bring this action; that being asked his residence, he gave 12 Essex-street, and that was the place where he always stopped when he was in Dublin. The plaintiff's attorney says that he was instructed that the plaintiff's Dublin address is 12 Essex-street, Dublin. Mr. Samuel Madder O'Brien, an attorney, who is charged with being concerned in the proceedings, has made an affidavit in which he has denied that he was acting in concert with Cannon, and stated that he never saw the bill of exchange until he saw it in Tinkler's hand, and that he did not believe that Cannon ever kept a gambling-house in Dublin as alleged.—[PENNEFATHER, B. Do they state how they got the bill?—No; but we state that it was given to Cannon for a gambling debt.

T. T. 1847.  
*Each. of Pleas.*

COATS-  
WORTH  
v.  
WILLING-  
TON.

T. T. 1847.  
*Exch. of Pleas.*

COATS-  
WORTH  
v.  
WILLING-  
TON.

*R. Armstrong*, on behalf of the defendant and his attorney.

It has been alleged at the other side that the bill is paid; but the deponent merely states upon belief that the bill is paid; the drawer of the bill does not make any affidavit that it is paid.

The plaintiff's attorney states that Coatsworth informed him he was a merchant in Athlone, and that his appearance was respectable; that he told him that the defendant was of a Tipperary family, and he came therefore to him being a Tipperary man to sue him; that the plaintiff handed him the bill to sue and also handed him £2, and that he heard no more of the plaintiff until he was asked for his address, when he wrote to him for it: it is hard to visit the attorney with costs.—[PENNEFATHER, B. If people will transact business for persons of whom they know nothing, they must take the consequences. Surely there is nothing extraordinary in an attorney being expected to know his client's residence. It is one of the commonest orders that an attorney shall give the residence of his client.—FIGOR, C. B. There is a provision of an Act of Parliament upon the subject: when the attorney was asked for the plaintiff's address did he give any reply?] He said he would write to him. The defendant ought not to have indulged in such a vituperative affidavit; he had no right to mix up the plaintiff's attorney with Cannon.

PENNEFATHER, B.

Then you might, if you pleased, have applied to have his affidavit referred for prolixity.

The Court ordered the rule to be made absolute.

ORDERED—That said conditional order be made absolute, and accordingly that the plaintiff's proceedings be stayed until the said plaintiff shall give security for the costs already incurred, and to be incurred in this cause by the defendant; and that Francis G. Tinkler, gentleman, plaintiff's attorney, do pay the costs of the said conditional order and of this motion to the defendant.

T. T. 1847.  
*Exch. of Pleas.*

ANONYMOUS.

ROLLESTONE having moved a motion upon notice—

The attorney at the other side objected that the attorney whose name was attached to the notice of motion was not an attorney of this Court.

*Rollestone* handed in the attorney's certificate, but it appeared on inspection that the date of it was of this day (June 11th), and of course later than the date of the notice, whereupon—

*Per Curiam.*

No rule upon this motion.

June 11.

A notice of motion signed by an attorney, the date of whose certificate is subsequent to the date of the notice, is irregular.

LOWRY v. ROBINSON.

June 12.

F. MEAGHER moved that the service of the notice of trial had in this cause be deemed good service, under the following circumstances:—Upon the last day for serving notice of trial in the ordinary course, and which was also the last day upon which the plaintiff was entitled to plead, notice of trial was served in anticipation of a plea. The defendant, however, did not plead on that day, but filed a plea early on the following morning. *Doolan v. Dunne* (a). In *Clarke and another v. Butler* (b), where the defendant, the 7th of June being the last day for pleading, filed on the 8th

Where the last day for serving a notice of trial is also the last day for pleading, a notice served on that day in anticipation of a plea is good, although the defendant does not plead until the following morning, if he then files an issuable plea.

(a) Bl. D. & O. 40.

(b) 1 J. & S. 268.

T. T. 1847. a plea of confession with a stay of execution until November, the  
*Each. of Pleas.* Court set the plea aside. *Darley v. M'Keown* (a).

LOWRY

v.

ROBINSON.

PENNEFATHER, B.

A defendant has no right to file a plea of confession with stay of execution; he has no right to annex a condition to his plea.

*E. S. Dix*, for the defendant.

The plaintiff had no right before issue was joined to serve notice of trial in anticipation of a plea, he might have marked judgment for want of a plea.—[PENNEFATHER, B. The question is, whether every defendant has a right to file a plea at *any time* before judgment?]*—Clarke v. Butler* was decided upon the ground, that a party has no right to attach a condition to his plea; and even in that case Crampton, J., differed from the rest of the Court; a plaintiff has no right to serve notice of trial until issue is joined. The terms of a notice of trial state “that issue being joined, this case will receive a trial;” therefore in such cases as the present, that notice will be false: *Darley v. M'Keown*. In *Lessee M'Cusker v. Corrigan* (b), upon a motion to set aside a nonsuit for not appearing to confess lease, entry and ouster, &c., the notice of trial was entitled “James Sharp, lessee of M'Cusker, v. Thrustout, the casual ejector;” Yelverton, C. B., said:—“In the notice for trial it is said, this cause being now at issue. Was the cause between the plaintiff and the casual ejector “at issue? After defence taken, no further proceedings are had “upon the original declaration;” and the rule for setting aside the nonsuit was made absolute. In *Doolan v. Dunne*, the Chief Baron says:—“It would be well, perhaps, to have another day on which notice of trial might be served after such pleas as this are put in.”

Suppose the last day for serving notice of trial was four days before the last day of Term, and that the defendant had until the last day to plead, could the plaintiff, four days before, serve notice of trial, on the presumption that the defendant would file an issua-

(a) 6 Law Rec. N. S. 389.

(b) Vern. & Scr. 236.

ble plea? What a dangerous thing it would be to hold that a plaintiff can serve notice of trial without looking at the plea: *Lessee M'Cusker v. Corrigan* (a).

T. T. 1847.  
*Exch. of Pleas.*  
 LOWRY  
 v.  
 ROBINSON.

*Meagher* replied.

PIGOT, C. B.

This is a matter purely of practice. We find a case reported on the subject; and we find from the officer that the report is a correct one. We think that we ought not to unsettle the practice of the Court. We think it of infinitely greater importance that the practice should be settled. We therefore grant the motion.

RICHARDS, B.

I really think that the rule, as settled, is a very fair one; the defendant has until a certain day to plead; he does not plead until the following morning, when he runs down to the office, and then there is a race between him and the plaintiff, and I think that is very unseemly. I think that the practice is much better that if the party chooses he may serve notice of trial at his peril; and if any frivolous plea is put in, or if a demurrer is filed, as in the case of *Comyns v. Barrington* (b), the Court would know how to deal with it. The rule cannot apply to very many cases, as it can only apply to cases where a plea is filed early on the morning following the last day for pleading; and then the Court hold it to be as if filed the day before.

Motion granted without costs.

(a) Vern. & Sor. 236.

(b) B. D. & O. 39, note.

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LINDSAY v. DOWLING.

J. W. BOYCE made a similar application, which was not opposed.

Like rule.

E. T. 1847.  
*Each. of Pleas.*

VANCE v. O'CONNOR.

May 6.

Where the defendant being confined in a private Lunatic Asylum, the process-server gave copies of the writ and notice at foot, and showed the original to the proprietor of the asylum (who refused to let him see the defendant) and to the defendant's brother, who was managing defendant's business in the house of the latter, the Court ordered that service of the writ of *capias* and of the order upon the defendant's brother, who was conducting the defendant's business on his behalf, and on the keeper of the Lunatic Asylum, be deemed good service of the defendant; serving upon the brother and keeper the particulars of the plaintiff's demand, and transmitting second copies of the process, order and said demand to the keeper of the Lunatic Asylum, to be by him transmitted to the person who pays for the maintenance of the defendant.

J. W. BOYCE, on a former day, moved that the service had of the writ of *capias ad respondendum* in this cause be deemed good service upon the defendant. The motion was founded upon the process-server's affidavit, which stated, "That on the 14th of April 1847 he "proceeded to serve the defendant with the writ therein mentioned, "but was unable to effect personal service on him in consequence of "deponent's having been informed, which he believes to be true, "that defendant was insane and residing in a private Lunatic Asylum "under the care of Dr. J. of M., who is the proprietor of said establishment;" that thereupon deponent "went to the said asylum for "the purpose of serving said defendant, and was told by the proprietor that he could not see the defendant, as he (the proprietor) did "not allow strangers to see any of the patients committed to his "care; that the deponent thereupon delivered a true copy of the "writ or process and notice at foot to the said proprietor, at the "same time showing him the original." The affidavit then proceeded to state that the deponent was informed and believed the business of the said defendant was conducted and carried on by his brother J. O. in Athy, in the same place in which the said defendant formerly had carried on said business; that on the same day deponent proceeded to the house of business of the said defendant's brother J. O., and from whom he demanded payment of the sum due to the plaintiff, and thereupon on the said J. O. informing deponent that he could not pay the said amount, deponent served the said J. O. in person with the writ or process and notice at foot, by delivering to and leaving with him a true copy and showing him the original; and that the said J. O. stated to deponent that he would at once send the said writ to the attorney of said defendant; and that the house of

business of said defendant was open and business conducted therein as usual, and managed by the defendant's brother on behalf of the defendant: *Wilmot v. Marmion* (a); *Humphreys v. Griffiths* (b); *Starkie v. Skilbeck* (c). In the cases in which the Court here grant a substitution of service, the Courts in England grant a distringas, and distringasses were issued against lunatic defendants in *Branson v. Moss* (d), *Jones v. Evans* (e), and *Banfield v. Darell* (f).

E. T. 1847.  
*Each. of Pleas.*  
 VANCE  
 v.  
 O'CONNOR.

The case having stood over for consideration, the Court\* this day made the following order:—

**ORDERED** that service of process in this cause and of this order upon the defendant's brother and on the keeper of the Lunatic Asylum in the said affidavit mentioned be deemed good service of the defendant, serving upon the said persons the particulars of the plaintiff's demand, and also transmitting second copies of the said process, this order and the said demand, to the said keeper of the Lunatic Asylum, to be transmitted by him to the person who pays for the maintenance of the said defendant.

(a) 8 Ir. Law Rep. 224.

(b) 6 M. & W. 89.

(c) 6 Dow. 52.

(d) 6 M. & W. 420.

(e) 8 Dow. P. C. 425.

(f) 2 Dow. L. 4.

\* *PIGOT, C. B., solus.*

E. T. 1847.  
*Exch. of Pleas.*

MAJOR, NESBITT and another v. LYNCH.

*May 6.*

Where after final judgment one of several co-plaintiffs dies, the survivors may (without issuing a *scire facias*) sue out execution by first entering upon the roll a suggestion of the death of the party.

SEMPLE moved in this case that a suggestion be entered on the record, that since final judgment was had in this cause one of the co-plaintiffs (Major) had died; and that execution do issue in the name of the surviving partners. The application is consistent with the practice in England as laid down in 2 *Archbold's Practice* by *Chitty* (p. 1398).—[PENNEFATHER, B. I think it will be a very proper suggestion, the suit does not abate.]—It does not; when there is a single plaintiff or defendant who dies, the course of proceeding must be by *scire facias*; but then it is necessary in such case to bring the personal representative before the Court; and although in Ireland the practice of issuing a *scire facias* in the case of the death of a co-plaintiff has prevailed, it appears unnecessary, and the English practice appears preferable.—[PENNEFATHER, B. Let it be so; but I think there should be an affidavit of the death of the party.]—In that case we should have to come to the Court again for an order.

PENNEFATHER, B.

No; on producing the affidavit in the office you can act by a Side-bar rule.

T. T. 1848.  
*Common Pleas.*

CHARLES PURDON, Executor of PETER PURDON,

v.

MAURICE LEAVY.

(*Common Pleas.*)

June 9.

ASSUMPSIT for use and occupation.—The declaration in this action, which was brought by the plaintiff as executor of Peter Purdon, was as follows:—"For that whereas the defendant, after "the death of the said Peter Purdon, to wit, on the 1st day of "November, A. D. 1847, was indebted to the plaintiff as executor as "aforesaid, in a large sum of money, to wit, the sum of £32. 1s. 8d., "for the use and occupation of a certain messuage and certain lands "and premises, with the appurtenances, of the said Peter Purdon "in his lifetime, by the defendant at his request, and by the suffer- "ance and permission of the said Peter Purdon in his lifetime, for "a long time before then elapsed, had, held and occupied, possessed "and enjoyed, to wit, at, &c.; and in £50 for money found to be "due from the defendant to the plaintiff as executor as aforesaid, on "an account stated between them the said plaintiff as executor as "aforesaid, and the said defendant, to wit, on the day and year last "aforesaid, at the place last aforesaid. And the defendant after- "wards, on the day and year last aforesaid, at the place aforesaid, "in consideration of the premises, respectively promised the plaintiff "as executor as aforesaid to pay to him the said several monies on "request; yet the defendant hath disregarded his promise, and hath "not paid any of the said monies, or any part thereof; to the damage "of the plaintiff as executor as aforesaid, of £100, and therefore he "brings his suit," &c.—(*Profert.*)

Assumpsit by an executor, for use and occupation in the lifetime of his testator, and upon an account stated between the defendant and the executor. Promise to the executor to pay to him the said several monies on request; Breach, "yet the defendant hath disregarded his promise, and hath not paid any of the said monies, or any part thereof." Special demurrer—first, because it was not alleged that the sum claimed was due to the testator in his lifetime; secondly, because the breach did not distinctly negative any payment to the testator. *Held*, that the declaration was good.

The defendant specially demurred to the count for use and occupation, and pleaded the general issue to the count upon an account stated.

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*Cuffe*, for the demurrer.

The declaration should state that the sum claimed was due to the testator in his lifetime, when the occupation is alleged to have taken place; for if the money became due after his death, the declaration should have stated that the testator himself had only a term in the land. Unless this appears upon the pleadings, it will be intended that he was seised in fee, and in such case the rent would belong to the heir and not to the executor or administrator: 1 *Wms. Exrs.*, p. 585, 2nd ed., citing *Norris v. Elsworth* (a). This is an unsuccessful attempt to proceed under the Apportionment Statutes.—[BALL, J. You are treating this declaration as if it were for rent. No question of apportionment can arise here.]—*Packer v. Gibbins* (b) may be relied on as showing that questions of apportionment may be raised in actions for use and occupation. At all events, the declaration is bad, for not stating that there was not any payment to the testator. The disregard of a promise alleged in the breach means a disregard of the only promise averred, viz., that to the executor; it is quite consistent with this, that the money may have been paid to the testator. If an action be by or against an assignee, heir or executor, the breach should be then in the disjunctive; and the declaration by husband and wife, or by an administrator, merely stating that the defendant did not pay before the marriage, or that he did not pay since the death, would be bad on demurrer, though aided by verdict: 1 *Chitty on Pleading*, p. 344, 7th ed.; *Elston v. Thorowgood* (c), and a case there mentioned by Treby, C. J., and *Hornsey v. Dimocke* (d). —[BALL, J. In *Hornsey v. Dimocke* the promise was in the alternative.—JACKSON, J. In order to have a good breach, there should be an averment negating payment to any person entitled to receive it.]—That is not the case with the breach here. The plaintiff's pleading is such as to lead to prolixity in the record, inasmuch as if we had pleaded that there was a payment to the testator during his lifetime, we should, as introducing new matter, have concluded with a verification, and thus, contrary to the rules of pleading, pro-

(a) 1 Freem. 463.

(c) Lord Raym. 283, 284.

(b) 1 G. & Dav. 10.

(d) 1 Vent. 119.

lixity would have been introduced into the record, in consequence of the want of a necessary averment in the declaration.—[TORRENS, J. Suppose the testator had entered into an agreement with the defendant that he was not to pay any thing during the testator's life, but that a payment for an occupation of the premises during that time should be made to his executor, would it in such a case be necessary to aver that there was no payment to the testator, or that the defendant was indebted to him?]

—There is nothing in the declaration to reveal such a contract, which, if it existed, should have been declared upon specially; and the Court will not imagine it, but on the contrary is bound to take the case most strongly against the pleader. Even if we suppose the contract to have been so, then there would be nothing here to show how the money became payable to the plaintiff. If the debt were one arising after the death of the testator, it should be so alleged; for where the debt arises subsequently to his death, the defendant could not set off a debt from the testator to him: *Wms. on Exrs.* p. 1473, 3rd ed. There is nothing contravening this position to be implied from *Blakesley v. Smallwood (a)*, the latest case upon the subject of set-off by or against executors. The defendant would therefore be unjustly embarrassed in pleading, if such a contract as that supposed were to be inferred from the declaration.

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*Hayes*, with whom was *Battersby*, for the plaintiff.

The consideration here is not the occupation, but the pre-existing debt, which Buller, J., says, in *Hawkes v. Saunders (b)*, has been repeatedly decided to be a sufficient consideration in point of law to support a promise. The action here being *indebitatus assumpsit*, the reason why the defendant is indebted has been sufficiently disclosed: 2 *Wms. Saunders*, 350, n. 2. It manifestly appears that the occupation was during the testator's lifetime; upon his death the debt passed to the executor.—[DOHERTY, C. J. Provided it had not been paid to the testator whilst living.]—The breach fully negatives such a payment; it is not merely that he disregarded his

(a) 8 Q. B. 538.

(b) Cowper, 293.  
9 L

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promise to the executor, or did not pay him, but generally that he did not pay anybody.—[*Per Curiam*. We were, up to this moment, under the impression that the payment negatived was a payment to the executor only. The case appears to us now in a very different point of view.]—In *Aleberry v. Walby* (a), there was a covenant “to pay or cause to be paid to them, or any of them;” the breach only averred that he did not pay them, to which it was objected that a non-payment to all was charged, whereas there might have been a payment to one of them, yet the breach was nevertheless held to be good. So too in *Debenham and Storr v. Chambers* (b), where the declaration stated that the defendant was indebted to the two plaintiffs, and one Machin in his lifetime, for money found to be due from the defendant to the plaintiffs and Machin on an account stated between them, laying the promise to the plaintiffs and Machin in his lifetime, a breach that “the defendant hath disregarded his promise, and hath not paid any of the said monies or “any part thereof,” was deemed sufficient, and the Court refused the defendants leave to amend.

*Codd*, in reply, contended that the averment “that the defendant hath not paid the said monies or any part thereof” was bad, for vagueness and uncertainty in not showing whom he did not pay, and that the breach should be construed to be co-extensive with the promise which was alleged to have been made to the executor only, and the averment would then simply mean that the defendant had not paid the executor; the words “yet the defendant hath disregarded his promise,” which are connected with the averment of non-payment, cut down the apparent generality of that averment.—[BALL, J. The breach is, that he did not pay, the other part is merely a preface to it.]

DOHERTY, C. J.

The unanimous feeling of the Court is, that the last point urged by the Counsel for the defendant is the only one which was arguable

(a) 1 Strange, 231.

(b) 3 M. & W. 128.

in the case. And even in respect to that point, all difficulty disappeared when the concluding averment in the declaration was fully brought to our notice. There are two allegations; first, that the defendant had disregarded his promise; and secondly, that he had not paid the said monies, or any part thereof. What does this last averment mean, but that the debt was not paid to anybody? We are asked to confine its application to a non-payment to the executor only in consequence of the foregoing phrase, but the Court will not assist the defendant by any such subtle construction. We find here a statement sufficiently large to include within it a denial of payment to either the testator in his lifetime, or since his decease to the executor; and we therefore think that, both upon authority and principle, this demurrer must be overruled.

Demurrer overruled.

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MARTIN and M'DOWELL

v.

BRICE SMYTH and JOHN SMYTH.

THE declaration in this action, which was on a bill of exchange, had been filed upon the 25th of May, and a rule to plead was entered upon the same day, but notice of filing the declaration was not given until the 26th of May, which was the first day of the present (Trinity) Term.

On the 31st of May, the defendants filed a plea in abatement, of the non-joinder of two other parties, who were alleged by the defendants to have made jointly with them the supposed

June 8.

A rule to plead entered upon a day previous to the service of notice of the filing of the declaration is a mere nullity.

Where a rule to plead had been entered under such circumstances, and a plea in abatement filed after

the expiration of four days from service of notice of the filing of the declaration, an application by the plaintiff to set aside the plea was refused with costs.

The officer of the Court has not power to receive a plea at any place except the office of the Court.

T. T. 1848. promises mentioned in the declaration, if any such were made.  
*Common Pleas.* On filing the plea the defendants also entered a rule to reply.

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*Tomb*, for the plaintiffs, now showed cause against the rule to reply, and also moved that the plea in abatement should be set aside or taken off the file, it not having been filed within four days inclusive after the day of filing or notice of filing the declaration: 1 *Ferg. Prac.* 265. The affidavit filed on behalf of the defendants states that their attorney resides at Banbridge, in the county of Down, and that his town agent lost no time in sending him an attested copy of the declaration; upon receiving which the defendant's attorney found it necessary to plead in abatement, and accordingly sent instructions for Counsel to prepare such a plea, which was done on Monday the 29th of May, and sent by that day's post to Banbridge to have the necessary verifying affidavit sworn, and was returned on the next day (Tuesday the 30th of May), but did not, and could not, have reached Dublin until five o'clock on that day, when the offices of the Court were closed; that however the town agent of the attorney for the defendants conceiving it possible that the officer would receive the plea in the course of the evening, served notice on the attorney for the plaintiffs of its being filed, and followed the officer to his residence, who declined there to receive the plea, which was accordingly not filed until the 31st of May. We, however, say, that even if the plea had been filed upon the 30th, it would have been a day too late; notice of filing the declaration having been given on Friday the 26th of May, the time expired upon Monday the 29th of May, Sunday being counted as one of the four days whenever it is not the first or last of those days.

DOHERTY, C. J.

The officer had no power to receive the plea elsewhere than at the office of the Court.

*T. Kennedy Lowry*, for the defendants, having first referred to 3 & 4 Vic. c. 105, sections 37, 38 and 39, preserving to defendants

the right to plead non-joinder of other persons in abatement, and to the 31st General Rule of Easter Term 1834, and to the Rule of the 13th of November 1790 in this Court, said that the plaintiffs' rule to plead was a nullity, having been entered on the day previous to the service of notice of filing the declaration; and that in fact the defendants were not bound to have pleaded at all. In *Sheehy v. Dorman* (a), a rule to plead, under similar circumstances to those here, was set aside as irregular, the Court there saying that a rule to plead is bad if it be entered of a day prior to that on which notice is served of the declaration having been filed. A similar course was pursued in an *Anonymous case* (b). We have gratuitously pleaded here.

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*Tomb*, in reply.

The defendants, having once pleaded, cannot treat the rule to plead as a nullity.

DOHERTY, C. J.

According to the practice of the Courts, an effective rule to plead can never be entered on a day previous to that of the service of notice of the filing of the declaration. We cannot consider the plaintiffs as having entered any rule to plead. The motion must be refused.

TORRENS, J.

Supposing that the defendants had never pleaded, but suffered you to mark judgment, on application to the Court that judgment would be set aside.

BALL, J.

The defendants may and have in fact here pleaded gratis.

JACKSON, J., concurred.

Motion refused with costs.

(a) 2 Fox. & Sm. 137.

(b) 3 Ir. Law Rep. 204.

T. T. 1848.  
*Common Pleas.*

FOTTRELL v. ARMSTRONG.

June 9.

Order for the substitution of service of a *capias ad respondendum*, under certain circumstances, upon the niece of a defendant, who resided with him.

P. O'BRIEN applied to the Court for an order for substitution of service of the *capias ad respondendum* in this case.

It appeared from the affidavit of the process-server that he had frequently called and watched at the residence of the defendant, for the purpose of serving him, but on such occasions was unable to see the defendant, although deponent believed him to be on those occasions in the house, having been so informed by a person who opened the window for him. On the 23rd of May 1848 deponent proceeded to the residence of the defendant, and saw his niece, who resided with the defendant; deponent applied to see defendant, but was refused, although his niece admitted that he was at the time in the house; whereupon deponent handed to her a true copy of the writ, which she refused to receive, and went quickly away; deponent then threw the copy of the writ to her and left it, desiring her to give it to the defendant, and at the same time showed her the original writ.

DOHERTY, C. J.

You may take the order.

T. T. 1848.  
*Common Pleas.*

COCHRANE v. COMYN.

June 8, 10.

THE defendant, upon his bill of exchange arriving at maturity, had given to the plaintiff, for the amount of the bill, a plea of confession accompanied by a release of errors.

The attorney for the plaintiff, after a lengthened correspondence had taken place between the parties, and under circumstances which it is unnecessary here to detail, marked judgment on the plea of confession. The *capias* was returnable in, and the appearance was entered as of, Hilary Term, the declaration was intituled as of Easter Term. The present motion was to set aside the proceedings, and was grounded upon two notices; in the first notice it was alleged that the judgment had been marked contrarily to good faith while a negotiation for payment of the debt was pending, and for the purpose of accumulating costs. The second notice stated that the declaration had been filed and the judgment marked without any *capias* having been sued out.

*Macdonogh*, for the defendant, moved that the proceedings should be set aside; and he accordingly entered at length into the question raised by the first notice, but finding the Court against him upon it, then relied upon the second notice, and under it contended that the fact of the declaration being intituled as of a Term subsequent to the appearance was an irregularity for which the Court would set aside the proceedings.

*Hamilton Smythe*, for the plaintiff, said that this latter point came upon him by surprise, inasmuch as the second notice only

Where a plea of confession accompanied by a release of errors was given, and afterwards a declaration was filed for the purpose of entering up judgment upon that plea, which declaration was intituled of a Term subsequent to that of the appearance, upon motion grounded upon two notices; the one unjustly imputing to the plaintiff a breach of faith in marking the judgment, and the other alleging that the judgment had been marked without any *capias* having been sued out; the Court refused to set aside the judgment. (TOMRENS, J., *dissentiente*.)

*Held*, per JACKSON, J., that the fact of the declaration being intituled of a Term different from that of the appearance, amount-

ed not only to irregularity but also to error, and as such was released. (TOMRENS, J., *dissentiente*. BALL, J., DOHERTY, C. J., *dubitantibus*.)

Whether the second notice of motion pointed out with sufficient precision the last-mentioned defect in the proceedings, *Quære?*

T. T. 1848. alleged that no *capias* had been sued out, and was therefore calculated to mislead the plaintiff as to the real nature of the objection.

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The Court desired that the motion should stand over, in order that Counsel for the plaintiff might look into the authorities on the subject.

### *Hamilton Smythe.*

June 10.

In *Page v. Murphy (a)*, the Court refused to allow a similar objection to prevail. Its triviality is shown by *Greer v. Bingham (b)*, in which the Court held, that where a plea of confession was given, the plaintiff's attorney might himself enter the appearance: *Barrett v. Barnard (c)*. Neither *Bardsley v. O'Neil*, mentioned in *Barrett v. Barnard*, or *Smith v. Muller (d)*, arose upon pleas of confession. The disinclination of the Court to encourage such an objection is shown by *Thompson v. Caldwell (e)*. Supposing it to be error, it has been released and cannot now be taken advantage of; or, treating it as an irregularity only, the release of errors is a waiver.

### *Macdonogh.*

All the cases which have been cited assume the irregularity of such a proceeding as the present. It does not amount to error, as it may be waived, and error cannot. Nor has it been waived by the release of errors, inasmuch as the defect is of subsequent occurrence to the giving of the plea of confession and release of errors. Even if it be error, it was not released, as the release comprises those mistakes merely which may occur in the entry of the judgment itself. In *Stratton v. Codd (f)* the Court of Queen's Bench held that a release of errors, in a warrant of attorney to confess judgment upon a bond, does not dispense with the necessity of suggesting breaches upon the bond.—[JACKSON, J. That does not apply here ;

(a) 4 Ir. Law Rep. 417.

(c) 2 F. & Sm. 230.

(e) 2 Jones Exch. R. 224.

(b) 8 Ir. Law Rep. 270.

(d) 3 T. R. 624.

(f) 9 Ir. Law Rep. 1.

suggestion is required by the statute, and takes place not at or before, but subsequently to the entering of the judgment.]—The *Executors of Bell v. Boswell* (a) was also referred to.

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JACKSON, J.

In this case a motion has been made to set aside the proceedings hitherto taken, upon two grounds, as stated in the notices, viz.—first, because it is said that the judgment was marked by the plaintiff's attorney contrary to good faith, and while a negotiation with respect to payment of the debt was pending; and secondly, because the declaration was filed without any *capias* having been sued out upon which it could have been founded.

Now, with regard to the first part of the motion, it appears to me that it must be refused, it not having been sustained in point of fact, inasmuch as there is not any ground for impeaching the conduct of the plaintiff's attorney in this transaction, who has acted throughout it with perfect propriety and good faith.

The second part of the motion it has been attempted to sustain, by showing that the appearance was entered as of one Term, and the declaration filed as of another Term. The notice of motion, however, points at this defect argumentatively only, by saying that the declaration was filed without any *capias* having been sued out. I do not think that to be a sufficient specification of the real fault. Supposing, however, that it were adequately stated, in my judgment we ought not to disturb those proceedings. It appears that for the sum remaining due to the plaintiffs, a plea of confession containing a release of errors was given; under these circumstances, the plaintiff might even have entered an appearance for the defendant if he (the plaintiff) had pleased.

It is too much then to say, that where the defendant has given such a plea and release of errors, he is entitled to have the proceedings set aside, for what I think is not merely an irregularity, but is something more—namely, error upon the face of the record; and if this be so, his release precludes him from taking any advantage of it. Supposing it not to be error, in the strict sense of the term,

(a) 2 Law Rec. N. S. 135.

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yet, as I have observed already, the defect, whatsoever it may be properly styled, has not been put forward with the necessary degree of precision in the notice of motion ; which fact, if it stood alone, I should consider as furnishing ample ground for refusing this part of the motion also.

BALL, J.

I must agree with my Brother JACKSON in thinking that the charges, which were intended to cast discredit upon the plaintiff's attorney, have altogether failed, and that his conduct has been wholly irreprehensible.

It is quite true that the second notice of motion, in alleging that the judgment was entered without any *capias* having been sued out, does not exactly indicate that the appearance was of one Term, and the declaration of another ; but I think that it does so substantially ; and so the Court has treated it in allowing the objection to be argued. With respect to that objection, there was *primâ facie* an impropriety in filing the declaration as of a Term subsequent to the appearance ; and if that impropriety or rather defect subsisted at the time of making this motion, I should have held it to be ground for setting aside the proceedings. But it seems to me at least doubtful whether it can be treated as now subsisting. There has been a release of errors which, it has been argued, operated only in case of strict error. Assuming the defect to be error, did it occur in entering the judgment ? Was it not for the purpose of entering the judgment that the declaration was filed ? If so, it may be considered as an act done and error committed in reference to the entry of the judgment itself, and as such released by the release of errors, and of course no longer in existence. It is, at the least, a doubtful matter. Is it then a suitable ground for setting aside proceedings where fraud has been unjustly imputed ? For what is it but fraud, if a person mark judgment contrarily to his promise, and for the purpose of accumulating costs ? I cannot consent to set aside these proceedings under such circumstances.

TORRENS, J.

In this case I forbear to enter at length into the first ground

put forward by the defendant's Counsel for setting aside the proceedings had in this cause, viz., that the judgment was marked contrary to good faith by the attorney, and for the purpose of accumulating costs. It has been fully discussed by the other Members of the Court, and I shall merely intimate my opinion that upon that point the defendant has in my judgment failed.

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But upon the other ground, namely, that the declaration has been filed as of a different Term from that of the appearance, I hold that the proceedings are irregular. I do not think that the defect is matter of error, and therefore falling within the release of errors contained in the plea of confession, but I consider it to be an irregularity. In the case of *Barrett v. Barnard* (a), and that of *Bardsley v. O'Neill* there cited, the Court of King's Bench, for the same cause which exists here, set aside the proceedings as irregular, considering it then as an irregularity. Now has it been waived by the release of errors? In the plea of confession the release is a release of errors which may occur in the entry of the judgment, such as misprisions of clerk, &c. &c.; but this cannot be called a misprision of clerk, nor strictly speaking can it be said to have been an error occurring in entering the judgment. Besides, where a defendant gives a plea of confession with a release of errors, in entering the judgment he cannot thereby relieve the plaintiff from the necessity of complying with the old and established rules of the Court, which prescribe the proper course and time to be pursued in entering judgment upon such a plea. I do not think that a defendant can assume to himself a right to dispense with our rules. I have therefore come to the conclusion that upon this branch of the motion the defendant ought to succeed.

DOHERTY, C. J.

This is an application to the discretion of the Court. Had the motion rested solely upon the first notice, the defendant must have at once and completely failed. I listened attentively to the very grave imputations here made, and to the facts upon which they were founded; character ought not to be assailed upon such light grounds

(a) 2 Fox & Sm. 230.

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as I think it has been in the present case. I cannot see that there was any harshness on the part of the plaintiff, or any thing unwarranted on the part of his attorney in marking this judgment. With respect to the second and subsequent notice, to which the defendant has been forced to resort in support of his motion, it seems to me that it would be inconsistent with the primarily amicable nature of the transaction, namely, the giving of a plea of confession with release of errors, that it should be scrutinised with a measure of severity to be meted out only to proceedings hostile *ab initio*. I am not inclined to allow to the defendant the benefit of this objection, whether the alleged defect amounts to irregularity only or to error, upon which question I do not feel it necessary to give any opinion; for even admitting it to have been merely an irregularity that the declaration was filed as of a Term subsequent to the appearance, I should not, under the circumstances of the case, allow a triumph to the defendant upon an objection so manifestly *inter apices*. The motion must be refused, but, as the Court is not unanimous, it must be without costs.

Motion refused.

### FARRELL v. FAGAN.

June 13.

In an action against several defendants, of whom some had pleaded on the 9th of June, being the last day for pleading, and of whom others had not pleaded until the morning of the 10th, and upon all of whom notice of trial had been served upon the evening of the 9th, a fresh notice of trial, served upon the 10th on those defendants who had filed their pleas at an earlier hour upon that day, was, upon motion, ordered to be deemed a sufficient notice of trial to them, although the 9th, according to the usual practice, was the last day for serving notice of trial.

THIS was an action brought to recover £94 for work done by the plaintiff at the Malahide Hotel, at the request of the defendants, who were very numerous. The last day for pleading was the 9th of June, and upon that day four of the defendants filed separate pleas of the general issue. On the evening of the same day notice of trial

was served upon the 10th, and upon all of whom notice of trial had been served upon the evening of the 9th, a fresh notice of trial, served upon the 10th on those defendants who had filed their pleas at an earlier hour upon that day, was, upon motion, ordered to be deemed a sufficient notice of trial to them, although the 9th, according to the usual practice, was the last day for serving notice of trial.

The costs of the above motion were ordered to be costs in the cause.

was served upon all the defendants. The plaintiff's attorney proceeding to mark judgment on the 10th of June against such of the defendants as had not pleaded, found that the defendant W. H. Wright, an attorney, had, upon the morning of that day, filed, on behalf of himself and twelve other defendants, a plea of the general issue. On the same day Wright served a notice upon the plaintiff's attorney, calling upon him to withdraw his notice of trial and not to venture to proceed thereon. On that day also the plaintiff's attorney served a fresh notice of trial upon Wright and the twelve defendants who pleaded contemporaneously with him. Against four other defendants judgment was marked for want of a plea.

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*Sherlock* now moved that the notice of trial given upon the 9th of June be deemed good, or that the notice of trial, given upon the 10th of June to Wright and the twelve defendants for whom he appeared, should be deemed good; and mentioned *Doolan v. Dunne* (a), in the Court of Exchequer, where a plea filed on the morning after the last day for pleading was held good, and notice of trial served before plea pleaded was held sufficient. Counsel now produced a certificate of the order made in *Doolan v. Dunne*, from which it appeared that the defendant there was an attorney, and that the costs of the motion were ordered to be costs in the cause. He also referred to *Lowry v. Robinson* (b), where notice of trial served upon the last day for pleading and for giving notice of trial, although the plea was not filed until the following morning, was held sufficient. If an opposite rule prevailed, any defendant, by adopting the subterfuge of not filing his plea until the morning after the last day for pleading, might prevent the plaintiff from going to trial at the ensuing Sittings.

*Lawless* contended that the notice of trial of the 9th was irregular, there not having then been any plea on the file, and that the notice of the 10th was too late.

(a) 1 Black. Duu. & Osb. 40.

(b) 1 Black. Duu. & Osb. 197.

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*Common Pleas.*

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DOHERTY, C. J.

Let the notice of trial served upon the 10th of June be deemed sufficient notice of trial to Wright and those defendants for whom he appears, and let the costs of this motion be costs in the cause.

Motion granted.

O'MALLEY v. O'MALLEY.

June 2.

The Court will not, as against an executor *de son tort*, permit the revival of a judgment.—*Semble.*

CONCANNON moved for leave to revive the judgment in this case as against an executor *de son tort*.—[BALL, J. Why do you not bring an action upon it?—In *Carmichael v. Carmichael* (a) Lord Cottenham lays it down that an executor *de son tort* is subject to all the liabilities, but not entitled to any of the privileges of an executor.—[DOHERTY, C. J. I think that you must proceed by action upon your judgment. The revival of a judgment against an executor *de son tort* appears to me open to great objection.]—We are informed that the officers of this Court and of the Court of Exchequer say that the course we propose has been previously adopted.

TORRENS, J.

If you bring down the officer and bring with him a precedent such as you suppose to exist, you may mention this matter again. At present we are by no means disposed to grant your motion.

The matter was not again mentioned.

(a) 2 Phil. R. 101.

T. T. 1847.  
*Book of Pleas.*

POWER v. ST. GEORGE.

(*Exchequer of Pleas.*)

May 24, 25, 27.

THIS case, which was tried at the Summer Assizes of Roscommon, before Mr. Justice BALL, and a special jury of the county, was an action on the case brought to recover damages for the malicious detention of the plaintiff by the defendant in the county gaol of Roscommon, the plaintiff having been arrested in execution upon a judgment obtained by the defendant against the plaintiff; the plaintiff alleging that the amount due on foot of the said judgment had been satisfied by him.

The first count of the declaration was as follows:—"Thomas Power, the plaintiff in this suit, a debtor to our Sovereign Lady the Queen, comes before the Barons of her Majesty's Exchequer at the Queen's Courts at Dublin, in Ireland, on the 11th day of

The plaintiff in the first count of the declaration stated, that being tenant from year to year under Sir R. B. St. G. of certain premises, comprising a dwelling house, offices and land, he owed his landlord a certain sum for rent; that the defendant R. St. G., who was the agent of Sir R. B. St. G., had obtained a judgment in an action of

assumpsit for a sum which included the sum due to Sir R. B. St. G. for rent; that having been arrested under a *ca. sa.* on foot of this judgment, the plaintiff delivered and gave up to the defendant as such agent the possession of the said demised lands and premises, with their appurtenances, and divers crops and valuables, in full satisfaction and discharge of the damages, costs and charges so adjudged to the defendant, together with poundage and all lawful expenses, being the whole amount lawfully due or demandable of and from the plaintiff by the defendant under the writ; and that the defendant then and there accepted and received the same in full discharge and satisfaction of the said damages, &c., and then and there agreed to instruct the Sheriff that the same was satisfied, and to give authority to the Sheriff to discharge the plaintiff, but did not, whereby the plaintiff was further detained in custody.

The second count was the same, except that it omitted the averment of the delivery of possession of the lands and premises.

The third and fourth counts were the same in other respects as the first and second, but omitted the agreement to discharge, and averred that upon the delivery in satisfaction the plaintiff was thereupon entitled to be discharged, but was not.

The fifth count was the same as the first, but omitted the averment of tenancy, or that the amount recovered by the judgment included the sum due to Sir R. B. St. G.

Plea, the general issue; verdict for the plaintiff.

*Held*, that the judgment having been in fact satisfied, there was a duty cast upon the defendant to discharge the plaintiff from custody, for the non-performance of which the action well lay.

*Held also*, that the obligation to discharge the plaintiff having arisen upon a contract executed, it was not void under the Statute of Frauds, by reason of the agreement not having been reduced to writing, and signed by the party.

The mode of taking and sustaining exceptions commented on.

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“November in this same Term, by Malachi Keogh his attorney,  
 “and complains by bill against Robert St. George the defendant in  
 “this suit, present here in Court the same day by Bernard Lynott  
 “his attorney, of a plea of trespass on the case, for that whereas  
 “heretofore, to wit, on the 1st day of May in the year of our Lord  
 “1843, to wit, at Roscommon in the county of Roscommon, the said  
 “plaintiff was possessed of certain lands and premises, to wit, the  
 “lands of Falty in the said county, together with the dwelling-  
 “house, offices and appurtenances thereunto belonging, as tenant  
 “thereof from year to year, under and by virtue of a demise thereof  
 “theretofore made to the said plaintiff by one Sir Richard Bligh  
 “St. George, to wit, on the 1st day of May in the year of our Lord  
 “1823, to wit, at Roscommon in the county aforesaid; and whereas  
 “also, heretofore, to wit, on the 1st day of May in the year of our  
 “Lord 1843, to wit, at Roscommon in the county aforesaid, the said  
 “plaintiff was indebted to the said Sir Richard Bligh St. George for  
 “rent of the said demised premises, in a large sum of money, to wit,  
 “the sum of £185 sterling: and whereas also, heretofore, to wit,  
 “on the 1st day of July in the year of our Lord 1843, to wit, at  
 “Roscommon in the county aforesaid, the said defendant was and  
 “acted as the land-agent and bailiff of the said Sir Richard Bligh  
 “St. George; and whereas also the said defendant afterwards, to  
 “wit, in Trinity Term, in the sixth year of the reign of our Lady  
 “the now Queen, before the Right Honorable John Doherty and  
 “his Brethren, then and still being the Justices of our said Lady  
 “the Queen of her Common Bench of her kingdom of Ireland, to  
 “wit, at the Queen’s Courts Dublin, to wit, in the county aforesaid,  
 “by the consideration and judgment of the said Court recovered  
 “against the said plaintiff a certain sum of money, to wit, the sum of  
 “£106. 17s. 3d. sterling, which in and by the said Court were then  
 “and there adjudged to the said defendant for his damages which he  
 “had sustained, as well by reason of the non-performance by the said  
 “plaintiff of certain promises and undertakings then lately made by  
 “the said plaintiff to the said defendant, and acknowledged by the  
 “said plaintiff as and for his the said defendant’s expenses and costs  
 “by the said Court adjudged to the said defendant at his request,

“according to the form of the statute, as by the record and proceedings thereof still remaining in the said Court of our said Lady the Queen, of her Common Bench aforesaid, at the Queen’s Courts Dublin, aforesaid, more fully appears: and the said plaintiff further saith, that the said sum of £106. 17s. 3d. consisted partly of a portion of the said sum of £185 so due by the said plaintiff to the said Sir Richard Bligh St. George, for rent of the said demised premises as aforesaid, to wit, in the county aforesaid: and the said plaintiff further saith that the said defendant, for having execution of the said judgment, afterwards, to wit, on the 15th day of June in the sixth year of the reign of our said Lady the Queen, issued and prosecuted out of the said Court of our said Lady the Queen, of her Common Bench aforesaid, at the Queen’s Courts Dublin, aforesaid, to wit, in the county aforesaid, a certain writ of our said Lady the Queen, called a *capias ad satisfaciendum*, upon said judgment against the said plaintiff, directed to the Sheriff of the county of Roscommon, by which said writ our said Lady the Queen commanded the said Sheriff that he should take the said plaintiff, if he should be found in his the said Sheriff’s bailiwick, and him safely keep, so that the said Sheriff might have his body before her Majesty’s Justices at the Queen’s Courts on the 2nd day of November then next following, to satisfy the said defendant the damages, expenses and costs in form aforesaid recovered, and that the said Sheriff should have there then that writ, which said writ afterwards, and before the delivering thereof to the said Sheriff to be executed as hereinafter mentioned, was, to wit, in the county aforesaid, marked at foot thereof with the sum of £106. 17s. 3d., as by the said writ may appear: and the said plaintiff further saith that afterwards, to wit, on the 15th day of July in the year of our Lord 1843, the said Sheriff of Roscommon, under and by virtue and according to the exigency of the said writ, took and seized the said plaintiff in execution, to wit, at Roscommon, in the county aforesaid; and the said plaintiff further saith, that he the said plaintiff being so taken and seized and kept in execution as aforesaid, to wit, on the 1st day of August in the year of our Lord 1843, to wit, at Roscommon in the county afore-

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“said, he the said plaintiff delivered and gave up to the said  
 “defendant as such agent of the said Sir Richard B. St. George,  
 “as aforesaid, the possession of the said lands, dwelling-house and  
 “offices, with the appurtenances so demised as aforesaid; and  
 “also then and there delivered over to the said defendant as such  
 “agent as aforesaid, divers, to wit, twenty acres of oats of great  
 “value, to wit, of the value of £150, and divers, to wit, thirteen  
 “acres of rye-grass of great value, to wit, of the value of £40,  
 “and divers, to wit, two acres of vetches of great value, to wit,  
 “of the value of £10, and divers, to wit, ten gates of great  
 “value, to wit, of the value of £20, and divers, to wit, ten  
 “stacks of turf of great value, to wit, of the value of £10, and  
 “divers, to wit, twenty forge tools of great value, to wit, of the  
 “value of £20, and divers, to wit, five acres of potatoes of great  
 “value, to wit, of the value of £50, the property, goods and  
 “chattels of the said plaintiff, in *full satisfaction and discharge of*  
 “*the damages, costs and charges so adjudged to* the said defendant,  
 “together with poundage and all lawful expenses, being the whole  
 “amount lawfully due or demandable of and from the plaintiff  
 “by the defendant under the said writ; and the plaintiff further  
 “saith that the said defendant then and there accepted and  
 “received the same in full discharge and satisfaction of the said  
 “damages, costs, charges, poundage and expenses as aforesaid,  
 “and then and there agreed to instruct and inform the said  
 “Sheriff that the same were satisfied, and to give the said Sheriff  
 “authority to discharge the plaintiff from his custody under the  
 “said writ; and the said plaintiff saith, that although after the  
 “said agreement a reasonable time in that behalf elapsed, yet  
 “the said defendant, wilfully and maliciously intending to oppress,  
 “harrass and injure the said plaintiff, and to cause him to be  
 “longer imprisoned and detained by the Sheriff under the said  
 “writ, without any reasonable cause whatever, wilfully and mali-  
 “ciously neglected and refused to instruct the said Sheriff as  
 “aforesaid, and did not, nor would, instruct the Sheriff that the  
 “said defendant was satisfied of his said damages, costs and charges,  
 “poundage and expenses as aforesaid, nor give authority to the

"Sheriff to release the said plaintiff out of his custody under the writ aforesaid: whereby and by reason of the said neglect and refusal of the said defendant in that behalf, the said plaintiff was further detained in custody under the said writ for a long space of time, to wit, the space of one month," &c.

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The second count averred a delivery and acceptance in full discharge of the debt on foot of said judgment of certain crops and goods, and that thereupon the defendant agreed to discharge plaintiff, but did not.

The third count averred the delivery by plaintiff, and acceptance by defendant of the possession of said house, lands and premises, and certain crops and goods, in full satisfaction of said debt, and that said plaintiff was then and there entitled to be discharged by said defendant, but was not.

The fourth count averred a like delivery and acceptance in full satisfaction of said debt of certain crops and goods, and that plaintiff was entitled to be discharged by said defendant, but was not.

The fifth count omitted the averments of plaintiff's tenancy under Sir Richard Bligh St. George, Bart., of debt due to Sir Richard St. George for rent, and of the defendant's agency, but averred delivery by plaintiff, and acceptance by defendant of the house, land and premises, and of certain crops and goods in full satisfaction of said debt and fees, and that defendant agreed to discharge plaintiff, but did not.

The defendant pleaded the general issue. At the trial the judgment in the case of *Robert St. George v. Thomas Power*, of Trinity Term 1843, for £106. 17s. 3d., was proved in evidence, and that the plaintiff was, on the 15th of July 1843 arrested by the Sheriff of the county of Roscommon upon a *ca. sa.* issued thereupon. It appeared also from the evidence that the defendant, as agent to Sir Richard Bligh St. George, having seized the plaintiff's goods for rent, a part of which rent was the subject of the judgment upon which the *ca. sa.* issued, and the plaintiff having issued a replevin (two notices of distress dated respectively the 3rd and 13th days of July 1843, were proved in evidence), on

T. T. 1847. *the 22nd of July a treaty was entered into between the defendant*  
*and John Power, the plaintiff's brother, on behalf of the plaintiff,*  
*the attorneys at both sides being present, and on which occasion the*  
*defendant stated that over £200 was due to him for rent by the*  
*plaintiff; that he had arranged to take £185 in crops, and other*  
*articles which were to be valued, and that on getting possession of*  
*the crops and other articles to the value of £185, together with*  
*the house and lands of Falty, he would discharge the plaintiff from*  
*gaol; and it was agreed that two valutors should be appointed,*  
*and that John Power and the defendant should meet, each with his*  
*valuator, on the 24th of July; and that defendant on same occasion*  
*said it would be satisfactory that there should be a deed prepared,*  
*releasing the defendant and his father Sir R. B. St. George from*  
*the replevin suit, and directed the plaintiff's attorney, Mr. M.*  
*Keogh, who had previously been in the habit of acting for the*  
*defendant, to prepare such a deed and that he would pay for it, and*  
*to submit it to his (defendant's) attorney, Mr. Walter M'Donagh,*  
*who was then present; and accordingly a draft deed was prepared*  
*by Keogh and submitted to Mr. M'Donagh, and approved of by him*  
*on behalf of the defendant. This draft deed, which was subsequently*  
*engrossed and given in evidence, recited a demise by Sir Richard*  
*B. St. George to the plaintiff, of the house and lands of Falty, at a*  
*rent of £88. 18s. per annum; that Power having become indebted to*  
*him in £185 for rent of said lands up to the 1st day of May last,*  
*proposed and agreed forthwith to surrender possession of the premises*  
*and lands, crops and other improvements, together with certain arti-*  
*cles mentioned in a schedule to the deed annexed, at the valuation*  
*therein stated, "to Sir Richard St. George, his heirs and assigns for*  
*"ever, in consideration of, liquidation and compensation for, and in*  
*"lieu, satisfaction and full discharge of all rents or other demands*  
*"the said Sir R. St. George, or any agent or other person in trust*  
*"for him might have against him the said Thomas Power or any*  
*"person deriving under him, for or on account of all rent or*  
*"arrears of rent issuing and payable out of said lands, or for and*  
*"on account of any other demand whatsoever; and for all of which*  
*"rent, arrears of rent and other demands whatsoever against the*

“said Thomas Power, the said Sir Richard St. George is to give  
 “an effectual release and discharge to the said Thomas Power, and  
 “to procure his discharge from Roscommon gaol, wherein he is at  
 “present confined for debt accrued due in relation to the rents pay-  
 “able by him to said Sir Richard Bligh St. George; and further,  
 “that said Thomas Power doth agree to abandon and discontinue  
 “the replevin suit already instituted by him against said Sir Richard  
 “Bligh St. George, and his son and land-agent Robert St. George,  
 “Esq.,” and then proceeded as follows :—

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“Now know ye, that in consideration of obtaining the aforesaid  
 “release and discharge from all debts, dues and demands, for or on  
 “account of rent, arrears of rent or otherwise howsoever, due by  
 “the said Thomas Power to said Sir Richard Bligh St. George, and  
 “also in consideration of said Thomas Power being discharged  
 “from Roscommon gaol, from under the execution at said Robert St.  
 “George’s suit, and for divers other good causes and considerations  
 “him the said Thomas Power thereunto moving, he the said Thomas  
 “Power hath surrendered and yielded up, and by these presents doth  
 “surrender and yield up unto the said Sir Richard Bligh St. George,  
 “his heirs and assigns for ever, all that and every the before men-  
 “tioned dwelling-house, lands and tenements and premises of Falty,  
 “situate, &c., with all the appurtenances thereunto belonging, together  
 “with all his right, title, interest, term to come and unexpired, pro-  
 “perty, benefit, claim and demand whatsoever or howsoever in and to  
 “the same and every part thereof; and also doth surrender and yield  
 “up unto the said Sir Richard Bligh St. George the articles speci-  
 “fied and set forth in the schedule at foot thereof;” a covenant for  
 further assurances followed, and a schedule of the property referred  
 to, with the sums at which the articles were valued. The deed pur-  
 ported and was proved at the trial to have been executed by Power  
 the plaintiff, on the 18th of August, in the presence of his  
 attorney, under the circumstances hereafter mentioned. Evidence  
 however was also given that the deed was to be executed *after* the  
 release of the plaintiff. On the 24th of July there was a meeting  
 at plaintiff’s attorney’s office between the defendant, his attorney and  
 the plaintiff’s brother John Power and his valuator, when the

T. T. 1847. rough draft valuation was produced; the tot exceeded £185 by  
*Exch. of Pleas.* about £100. The defendant required that the valuation should be  
 POWER signed by the valuers, and also objected to several of the items,  
 v. saying that he did not require some of them, and that some of them  
 ST. GEORGE. were overvalued. The list having been reduced by the articles  
 objected to, the amount was reduced below £185, upon which plain-  
 tiff's attorney suggested that defendant should take two and a-half  
 acres of potatoes, a moiety of a field of five acres of potatoes which  
 were on the farm, to which the defendant assented; the amount then  
 was £2. 5s. 0d. over £185. The valuation was signed by Naughten  
 the plaintiff's valuator, but not by Caulfield the defendant's, who was  
 not then present, and ultimately refused to sign it. On the 27th of  
 July the defendant came to the plaintiff's attorney's office and asked  
 him had he the deed, and receipt and discharge ready; upon which  
 Mr. Keogh said he had, and produced the engrossed deed and read  
 it over to the defendant, who said that he had got possession and  
 all was right, and appointed to meet Mr. Keogh at Ahascragh on  
 the following morning early, in order that they might proceed to  
 Roscommon to discharge the plaintiff from custody; but next  
 morning (28th) about six o'clock, the plaintiff's attorney received  
 from the defendant the following note:—

"My Dear Sir—Upon consideration I think it would be foolish  
 "to go to Roscommon to-morrow morning, as we are not certain of  
 "finding the Sub-sheriff Mr. Malone at home, and might have to  
 "return without being able to arrange our business; therefore I  
 "think it would be advisable to put off our journey to Roscommon  
 "till Monday morning. I will write to Mr. Malone to-morrow to  
 "say that I will call on him early on Monday. I wish you to  
 "get Mr. Tim. Caulfield's signature to the valuation, as it is not  
 "complete.—Yours truly, ROBERT SAINT GEORGE."

"Weston, Ahascragh, Thursday July 27th, 1843.

"I will call on Saturday at Ballinasloe."

The following letter to the plaintiff's brother, who was acting on  
 his behalf, was also given in evidence:—

"Weston, July 28, 1843.

"DEAR SIR—I called on Mr. Keogh yesterday evening on my

"way home; we have arranged to meet in Roscommon early on  
 "Monday morning, and I have written to Mr. Malone, the Sub-  
 "sheriff, to say that I will call on him early on Monday; Mr.  
 "Keogh says we could not arrange the matter unless the Sheriff  
 "was at Roscommon to meet us, and would have to go another  
 "day if he was not at home, so I think it better to give him  
 "notice, for fear of any disappointment.—Yours truly,

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" ROBERT ST. GEORGE.

" John Power, Esq., Cloonagh."

The allegation in this letter of the unwillingness of plaintiff's attorney to proceed to Roscommon until an arrangement was first made for the Sub-sheriff's attendance was denied by Mr. Keogh.

On the 29th of July 1843, defendant brought to Mr. Keogh's office, at Ballinasloe, a letter signed by Tim. Caulfield, refusing to sign the valuation, and stating that he did not agree to it. Plaintiff's attorney on that occasion tendered to the defendant for his signature a document authorising the discharge of the plaintiff from custody, which he refused to sign, stating that he would sign it if he got the remainder of the potatoes already mentioned.

It appeared in evidence that the defendant did, on the 27th of July 1843, obtain possession of the land and property, and that on the 29th of July, at a further interview between the plaintiff's and defendant's attorneys, the defendant said the things were overvalued, but if he got the potatoes and some manure which was on the premises, he would discharge the plaintiff. On the 31st of July, the day on which he was to have attended at Roscommon to have discharged the plaintiff from custody, the defendant served the following notice :—

"SIRs—I hereby give you notice that I am ready, on the part  
 "of Sir Richard Bligh St. George, to perform and abide by the  
 "terms of the agreement or arrangement entered into between me,  
 "on the part of Sir Richard Bligh St. George and Malachi Keogh,  
 "and John Power on the part of Thomas Power; and inasmuch  
 "as Timothy Caulfield and Patrick Naughten, the arbitrators  
 "named on such arrangement, have disagreed, I therefore hereby  
 "offer you to have other arbitrators mutually named in their place

T. T. 1847. "and stead, with a power to them, in case they disagree, to call  
*Each. of Pleas.* "in a third person whose decision shall be final and conclusive;  
 POWER "upon which being done, I shall sign such documents as may be  
 v. ST. GEORGE. "proper to release the said Thomas Power from prison.—Dated  
 "this 31st day of July 1843. "ROBERT ST. GEORGE.

"To Thomas Power and John Power, Esqrs.,  
 "and Malachi Keogh, Esq., attorney for  
 "the said Thomas Power."

On the 2nd of August 1843, the plaintiff's attorney gave the defendant's attorney the engrossed deed of surrender of the lands of Falty, in order that he might take a copy of it, but did not receive it back until the 16th of August; the following notice, on behalf of the defendants, having been served in the meantime:—

"SIR—Whereas I consented to take the possession of the lands of  
 "Falty from you, on the part of your brother Thomas Power, Esq.,  
 "upon the express terms that your brother should execute the deed  
 "of surrender of said lands theretofore prepared by Malachi Keogh,  
 "Esq., his attorney, and that the valuation of the chattels to be  
 "given up to me in discharge of the rent due by your said brother  
 "to Sir Richard Bligh St. George, Bart., should be completed by  
 "Timothy and Patrick Naughten, the valutors heretofore ap-  
 "pointed for that purpose; and whereas the said valuation has  
 "not been so completed, and whereas your brother the said Thomas  
 "Power has not executed the said deed of surrender, and whereas  
 "the said Malachi Keogh his attorney has stated that your said  
 "brother will not execute said deed; now take notice that I hereby  
 "abandon and relinquish the possession of said lands and premises;  
 "and I also apprise you that I will attend on Thursday next the  
 "10th instant, at the hour of twelve o'clock in the noon, for the  
 "purpose of restoring the possession thereof to you or to any person  
 "you may appoint on behalf of your said brother.—Dated this 8th  
 "day of August 1843. "ROBERT ST. GEORGE.

"To John Power, Esq."

A notice of the 8th of August, on behalf of the plaintiff, was given in evidence, which stated that plaintiff's attorney would, immediately on getting back the deed, attend at Roscommon to get

the plaintiff to execute it, when and where the defendant might attend, or send a discharge, authorising the Sheriff of Roscommon to discharge Mr. Power from custody; the deed of surrender was returned, accompanied by a notice dated the 10th of August 1843, signed by the defendant, stating that he, for and on behalf of Sir Richard St. George, attended pursuant to a notice of the 8th of August, for the purpose of abandoning and restoring the conditional or such other possession thereof as he had for said Sir Richard St. George, to some person for and on behalf of Mr. Thomas Power, and that he did accordingly relinquish and restore the possession on the 10th day of August instant, to Michael Dolan, the servant of the said Thomas Power. Upon the same day, the plaintiff's attorney served a notice repudiating the authority of Michael Dolan to take back the possession of the lands, on behalf of the plaintiff, and declining to accept it; and stating that he would attend at Roscommon on the 18th of August in order to get the deed executed, when and where Mr. St. George might attend to discharge Mr. Power, or might send a discharge for him from the execution at his (St. George's) suit.

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It further appeared that Mr. Keogh attended at Roscommon on the 18th of August, when the plaintiff executed the deed of surrender, but was not discharged by the defendant; subsequently, upon the 31st of August, the plaintiff paid the sum marked at foot of the writ, and was accordingly discharged.

Mr. Keogh deposed that it was on the 24th of July, and after the valuation on that day, that he received full instructions to prepare the deed of surrender; though on the 22nd he had been told by the defendant to prepare it. Evidence was given that the two valuers had, on the 24th of July, valued the crops and certain other articles, and had agreed on their valuation; but there was also evidence directly contradicting the fact of their agreement. It was proved that on the 27th of July, possession of the lands was given by the plaintiff's brother to the defendant, "by sod and twig," and of the house and all the articles specified in the schedule of the deed, and that two of defendant's men were placed in possession; there was no evidence that Michael Dolan, to whom, as to a servant of the plaintiff,

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possession of the lands and premises of Falty was alleged to have been afterwards restored, had any authority to receive back the possession.

It was proved that the agreement entered into with defendant by the plaintiff's brother was, that plaintiff "was to give up and be done for ever with the lands of Falty;" and the witness who gave the defendant possession of the lands stated positively that it was an absolute and not a conditional possession which was given by him to the defendant. However, on behalf of the defendant, evidence was given that the possession given to the defendant was only "a nominal or conditional possession," to become absolute in case certain things were done, two of which were that the deed should be executed, and the list signed by the valutors; and Timothy Caulfield, the valuator appointed by Mr. St. George, stated that he disagreed with the other valuator, and thought he valued too high, and said so at the time, and refused to sign such a valuation.

The learned Judge told the jury that the plaintiff complained by his declaration that he had put the defendant into possession of the lands, and had delivered up crops and other valuables in full satisfaction of the debt, and that the defendant had accepted the possession of the lands and the delivery of the chattels in full satisfaction and discharge of said debt, and that the defendant thereupon undertook to discharge the plaintiff from custody, but had not done so; that it was for them to decide on the evidence, first, whether the possession of the land and the delivery of the crops was so given as averred? secondly, was the possession of the land and delivery of the chattels as averred in the declaration accepted by the defendant in discharge of the debt? thirdly, did the defendant thereon undertake to discharge the plaintiff from custody? fourthly, did he fail to perform his undertaking?

And the learned Judge further told the jury that, as to the giving of the possession and acceptance thereof by the defendant, they would consider was it an absolute giving and acceptance, or was it conditional, to depend upon certain acts being done by the plaintiff? If they were of opinion that possession was given and accepted without any condition in discharge of the debt, then the averment

to that effect in the declaration was proved; but if they were of opinion that it was conditional, to depend on certain acts to be done by plaintiff, and that such acts were not done, then it was the same as if no possession at all was given, and the plaintiff must fail; and that it was for them to decide, whether the valuation was completed and acquiesced in by the defendant? And that if they were of opinion that it was so acquiesced in, and that the defendant accepted the possession as then given, and valuation of the crops as then made, and that he then agreed to discharge the plaintiff, the averment to that effect in the declaration would be sustained.

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To this direction the defendant's Counsel took the following exceptions:—First, that the learned Judge should have told the jury, that if they believed the evidence, it established that the cause of action arose from an agreement between the plaintiff and the defendant, that the plaintiff should make a perfect, valid and absolute surrender of the lands in the declaration to Sir Richard Bligh St. George, and transfer to him the absolute property in the crops and other chattels mentioned in the declaration, specified as the consideration for the discharge of the plaintiff from custody; and that as no sufficient evidence was given to prove that the plaintiff had so surrendered the lands and transferred the crops and other chattels to Sir Richard Bligh St. George, they should find a verdict for the defendant. Secondly, that the learned Judge should have told the jury, that if they believed it was part of the agreement that the plaintiff should surrender to Sir Richard Bligh St. George the lands in the declaration mentioned, they should find for the defendant, inasmuch as no sufficient evidence was given to establish that the plaintiff had so surrendered the lands. Thirdly, that the learned Judge should have told the jury, that if they believed that it was part of the agreement between the plaintiff and defendant that the plaintiff should surrender to Sir Richard Bligh St. George the lands in the declaration mentioned, as a condition precedent to his being discharged from custody, that such agreement, in order to be binding, ought to have been in writing; and that no sufficient evidence having been given to show that such

T. T. 1847. agreement was reduced to writing or signed by the defendant, or  
*Each. of Pleas.* any person authorised by him, he was not bound thereby, and was  
 POWER entitled to abandon or repudiate the same; and that as the defend-  
 v. ant did by his notice, bearing date the 8th day of August 1843,  
 ST. GEORGE. sufficiently abandon and repudiate the said agreement, and was no  
 longer bound thereby, and that no duty was imposed on him, nor  
 was he bound to instruct or inform the said Sheriff that the damages,  
 costs, charges, poundage and expenses were satisfied, or to give to  
 the said Sheriff authority to discharge the said plaintiff from custody  
 under the writ in the declaration, they should find a verdict for the  
 defendant. Fourthly, that the learned Judge should have told the  
 jury, that if they believed that the contract between the plaintiff  
 and defendant was, that defendant should procure the plaintiff to be  
 discharged from the custody of the said Sheriff, in consideration  
 of the plaintiff's surrendering the said lands and transferring the  
 property in the said crops and other chattels in the declaration;  
 therefore, that the said agreement, not being in writing or signed  
 by the defendant, or any person duly authorised by him in that  
 behalf, was not binding on the defendant, nor was he by reason  
 thereof liable or subject to any duty, and that they should find a  
 verdict for the defendant. Fifthly, that the learned Judge should  
 have told the jury, that if they believed that it was part of the  
 agreement between the plaintiff and defendant, in the first and  
 second counts, that the plaintiff should surrender to Sir Richard  
 Bligh St. George the lands in the declaration, and transfer to him  
 the absolute ownership and possession of the crops and other chattels  
 in the said counts mentioned, that they should find for the defendant  
 on these counts, inasmuch as such agreement was different and  
 variant from the agreement stated in the said two first counts of the  
 said declaration mentioned, and that they should find a verdict on  
 said two first counts for the said defendant. Sixthly, that the learned  
 Judge should have told the jury, that if they believed that the  
 delivering and giving up to the defendant in the manner in the  
 several counts of the declaration mentioned, of the lands and crops  
 and other chattels in said counts respectively mentioned, was in part  
 performance of an entire contract or agreement so to deliver and

give up same, and also to surrender the estate and interest of the said plaintiff in the said lands to Sir Richard Bligh St. George, and that such delivering and giving up, together with such surrender, was to be in full satisfaction and discharge of the damages, costs, charges and the whole demand due or demandable from the said plaintiff by the said defendant on foot of the said writ of *capias ad satisfaciendum*, that such contract or agreement not being in writing or signed by the defendant or any person on his behalf, defendant was not bound thereby, and was entitled to repudiate and abandon same; and that no part execution or performance thereof could be or was a satisfaction or discharge of the said damages, costs, charges and whole demand due on foot of said writ of *ca. sa.*; and that if the jury believed that the defendant had repudiated the said contract and abandoned same before the execution of a valid surrender of the said lands to the said Sir Richard Bligh St. George, that they should find for the defendant. Seventhly, that the learned Judge should have told the jury that the engrossment of the deed produced and proved by the plaintiff established that the agreement was for a surrender of the estate of the plaintiff in the lands in the declaration mentioned; and that no such surrender having been made and accepted, the defendant was entitled to a verdict. Eighthly, that the learned Judge should have told the jury that they should find a verdict for the defendant, because the cause of action arose from a contract, and there was no evidence of a performance of the same between the parties; but on the contrary, it was proved by the plaintiff's evidence that the said contract was correctly set out in the engrossment of the deed of surrender given in evidence on behalf of the plaintiff, whereby it appeared that part of the said contract to be performed by the said plaintiff was the execution by him the said plaintiff of the said deed of surrender, and yet the same was not executed until the 18th of August 1843, after the defendant had caused the plaintiff to be served with the notice of the 8th of August 1843, by which he repudiated and rescinded the said contract, and refused to be bound thereby, and after the said defendant had relinquished the possession of the said lands of Falty.

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There having been a verdict for the plaintiff for £500 damages, the case now came on to be argued upon the above exceptions.

*Thomas White*, with whom was *Brewster*, in support of the exceptions.

The deed poll given in evidence was never in possession of Sir Richard St. George, or any one on his behalf; it was never tendered. There was no evidence of any actual legal surrender; the only way in which the effect of that omission can be met is, by contending that there was a surrender by operation of law. The defendant could not have been compellable to discharge the plaintiff from custody without the payment in money of the debt, or an agreement to discharge him; but the surrender in the present case was not a surrender by operation of law: *Lynch v. Lynch (a)*; and if it was not a surrender by operation of law, it was no surrender at all, and therefore the direction of the learned Judge was wrong: this objection applies to the second and seventh exceptions. *Dodd v. Acklom (b)* was decided on the doctrine of estoppel. As to the fourth and fifth exceptions, the charge of the learned Judge does not meet the objection contained in them, that there was a variance between the engrossed deed given in evidence and the agreement declared on: *Wood v. Benson (c)*.—[PIGOT, C. B. There can be no doubt that you must set out the whole of the consideration, and so much of the agreement as the violation for which you which seek to recover damages extends to.]—That is the settled rule of pleading, and it has not been complied with in the present case: *Miles v. Sheward (d)*. The third, fourth and sixth exceptions raise the question of the applicability of the Statute of Frauds to this case.—[PIGOT, C. B. It is one thing to contract on condition of the plaintiff agreeing to surrender, and another to contract on condition of his doing the act, in which latter case the Statute of Frauds would be out of the question.]—If any part of the contract is within the Statute of Frauds, the whole is within it; the plaintiff

(a) 6 Ir. Law Rep. 131.

(b) 7 Scott, N. C. 415.

(c) 2 Tyr. 93; S. C. Cr. & J. 94.

(d) 8 East, 7.

has in effect pleaded by his declaration that there was an accord T. T. 1847.  
and satisfaction; and therefore, as that was not by the payment of *Exch. of Pleas.*  
money, there must have been some agreement entered into, as there *POWER*  
was no legal consequence that the plaintiff should be discharged *v.*  
from custody by reason of the delivery of possession of the lands, ST. GEORGE.  
it must therefore have been that there was an agreement, that  
in consideration of the delivery of possession of the lands, the plain-  
tiff should be discharged from custody; there was no duty cast upon  
the plaintiff in execution. The note in writing in this case, even  
if it be not at variance with the agreement proved, still does not  
satisfy the statute: *Boydell v. Drummond* (a): but admittedly  
there is no note in writing here, signed by the defendant; the  
draft deed signed by the defendant's attorney is not enough:  
*Hawkins v. Holmes* (b); *Evans and another v. Nichol and*  
*another* (c). If the contract is not enforceable in assumpsit, the  
plaintiff cannot, by alleging that a duty was raised on the part of  
the defendant to discharge him from custody, in that way evade  
the statute. If there was no promise, there was no duty. *Wain*  
*v. Walters* (d) is also in point, and *Mechelen v. Wallace* (e);  
*Lord Falmouth v. Thomas* (f); *Goss v. Lord Nugent* (g).—  
[PIGOT, C. B. Does your argument go to this, that if a contract  
which was void under the Statute of Frauds was afterwards exe-  
cuted, that would not be a good consideration for the plaintiff's  
discharge out of custody? Suppose a parol contract to deliver up  
possession, and after it had been done, the plaintiff said to the  
defendant, "Now, as you have done all this at my request, I now  
agree to discharge you," would you say, that under no circum-  
stances could that agreement be enforced?—I would say so.—  
[PENNEFATHER, B. Your argument must go to that length.]—  
As to the question of accord and satisfaction, it is necessary to  
show that there was an accord, an agreement: take out of the  
case the agreement to discharge, and there was no duty cast upon

(a) 11 East, 142.

(b) 1 P. Wms. 770.

(c) 4 Scott, N. B. 48.

(d) 5 East, 10.

(e) 7 Adol. & El. 49.

(f) 1 Cr. & M. 89; S. C. 3 Tyr. 26.

(g) 5 B. & Ad. 58.

T. T. 1847. *Each. of Pleas.* the defendant to discharge the plaintiff; there was no legal obligation on him (defendant) to satisfy the debt. It is quite a different thing to extinguish a matter, and to raise a duty: *Hubert v. POWER v.*  
 ST. GEORGE. *Turner (a). Cocking v. Ward (b)* decided, that if any thing remained to be done, to enforce which an action at law was necessary, it is within the Statute of Frauds. In *Bentham v. Harding (c)*, *Price v. Maberly* was cited and disapproved of. *Crosbie v. Wadsworth (d)*; *Scorell v. Boxal (e)*; *Carrington v. Roots (f)*; *Wilkinson v. Lloyd (g)*; *Smith v. Surman (h)*.

*Workman*, with whom was *Napier*, contra.

The cases which have been cited are not applicable to the present: *Crozier v. Pilling (i)*. All the cases cited were cases of actions brought to enforce contracts for the purchase of lands: *Cooper v. Stephens and wife (k)*; *Hart v. Nash (l)*. The declaration avers merely the giving up of possession in satisfaction of the debt. It avers nothing by way of satisfaction anterior to giving possession. *Cocking v Ward (m)* is rather in our favour: *Seagoe v. Deane (n)*. We say that the moment that the lands and goods were delivered over, it is just the same as if we had paid the money in hard cash, and the duty to discharge the plaintiff immediately arose. But besides, there was a surrender by operation of law. *Lynch v. Lynch* is quite distinguishable from the present case, and its authority is questioned in *Creagh v. Blood (o)*.—[PIGOT, C. B. In *Creagh v. Blood*, Sir Edward Sugden disputed all those cases about surrender by operation of law.]—Where the tenant goes out of possession, and the landlord goes in, there is a change of possession effected, and the Statute of Frauds does not apply: *Dodd v. Acklom (p)*, citing

(a) 4 Scott, N. C. 486.

(c) 6 Ir. Law Rep. 179.

(e) 1 Y. & Jer. 396.

(g) 7 Q. B. 27.

(i) 4 B. & C. 26.

(l) 2 Cr. M. & Rosc. 337.

(n) 4 Bing. 459.

(b) M. G. & Scott, 856.

(d) 6 East, 602.

(f) 2 Mees. & Wels. 248.

(h) 4 M. & R. 455; S. C. 9 B. & C. 561.

(k) 5 N. & M. 635.

(m) M. Gr. & Sc. 858.

(o) 8 Ir. Law Rep. 706.

(p) Per Tindal, C. J., 7 Sc. N. R. 415.

*Grimmon v. Legge* (a); *Mollett v. Brain* (b); *Doe v. Johnston* (c). T. T. 1847.  
 In the present case it has been found by the jury that we gave up <sup>Exch. of Pleas.</sup>  
 possession, and that he went into possession. POWER  
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The case stated on plaintiff's declaration is completely made ST. GEORGE.  
 out.

The deed shows that the contract was for the giving up possession of the lands. The delivering up possession by sod and twig was evidently intended to be a satisfaction of the debt. The contract was executed, and possession actually given; then the debt became fixed upon the party. In the case of *Crosby v. Wadsworth* (d) Lord Ellenborough says:—"The statute does not expressly and "immediately vacate such contracts if made by parol, it only precludes the bringing of actions to enforce them by charging the "contracting party or his representatives, on the ground of such "contract, or of some supposed breach thereof, which description of "action does not apply to the one now brought, viz., a mere action "of trespass, complaining of an injury to the possession of the "plaintiff, however acquired, by contract or otherwise. No doubt, "if nothing is done under the agreement, it might be repudiated."

That is the opinion of a great lawyer. *Souch v. Strawbridge* (e). It is there put on the ground, that where the contract is executed, then the statute does not apply.

The deed itself supports the case made by the plaintiff by the parol evidence, with reference to the interpretation to be given to the deed: *Beet v. Bidgood* (f): the deed itself being to be executed when the defendant got out of gaol, clearly the execution of it could not have been part of the contract for his discharge. Of course, as it was put by the learned Judge who tried the case, if the possession which was given was a conditional one, the defendant was entitled to a verdict; but the finding of the jury negatives that.

(a) 1 B. & C. 324.

(b) 2 Camp. 103.

(c) M'Cl. & Y. 141.

(d) 6 East, 611.

(e) 2 Com. B. Rep. 808; S. C. 15 Law Jour. 170, C. P.

(f) 7 B. & C. 469.

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*Brewster*, in reply.

*Hearn v. Stowell* (a) is in point. I do not contest the case of *Crozier v. Pilling* (b), nor do I deny that where a defendant pays the debt in specie, there the plaintiff is bound to discharge him : *Bayly v. Homan* (c). It is not necessary to consider whether there was a surrender by deed or not. The question is, whether there was evidence to go to the jury at all that there was a surrender? The case has been argued at the other side as if there was no evidence of any surrender at all. The deed gives in writing the terms of the contract which took place at the time, and it appears thereby that there is evidence to go to the jury that there was a contract to surrender. The disposal of the growing crops was clearly within the Statute of Frauds, and the tradition of them without a note in writing would be void; they could not have passed.—[LEFROY, B. Unless the land had passed.]—Yes; but then there must have been a surrender.—[PIGOT, C. B. Sir Edward Sugden certainly questions the authority of the case of *Creagh v. Blood*, and all that class of cases.]—According to the view I take, it is unnecessary to decide whether there was a surrender in fact or not. I maintain that an agreement for a surrender must be in writing, and that the agreement in this case was one which either party had a right to rescind, until it was in all its parts completed. It has been urged that the possession given to Mr. St. George (of the goods) concluded him; but how could it? They were things attached to the freehold; he got a possession, but it was a possession which he could not maintain against any one, and he had a right to repudiate the contract. The right of action here is founded on a contract. In *Brown v. Boorman* (d), Tindal, C. J., says :—“The principle in all these cases is, that the contract creates the duty.” But it is the whole contract. Suppose the contract were that he (the plaintiff) should deliver up the lands and goods, in the very words of the declaration here, and a puncheon of whiskey, would the duty arise until he delivered the puncheon of whiskey? The question of surrender or no surrender

(a) 12 Adol. &amp; El. 719.

(b) 4 B. &amp; C. 26.

(c) 3 Bing. N. C. 915.

(d) 11 Cl. &amp; Fin. 1.

is not to be considered, where a contract is for the giving of the goods and for a surrender of the lands; if it is void in part, it is void altogether. The leading cases on the subject are *Lexington v. Clarke* (a); *Thomas v. Williams* (b); *Lord Falmouth v. Thomas* (c). T. T. 1847.  
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—[PENNEFATHER, B. We are all of opinion that there was evidence to go to the jury of an agreement.—LEFROY, B. I perfectly concur with my learned Brother.—PIGOT, C. B. It appears to me that the agreement to discharge in the two first counts of the declaration forms no part of the cause of action; but that the satisfaction of the judgment being made, the duty to discharge immediately arose.]—There could have arisen no duty without a previous agreement.—[PIGOT, C. B. The agreement to discharge may be wholly unconnected with the contract to satisfy. The view I at present take is, that the agreement to discharge, mentioned in the three first counts in the declaration, is mere surplusage, as the law casts the duty upon the party.]

*Cur. ad. vult.*

PIGOT, C. B.

May 27.

This is an action on the case, in which the plaintiff complains, that having been arrested under a *capias ad satisfaciendum* issued on a judgment at the suit of the defendant, he was detained in prison under that arrest, after the judgment was satisfied; by reason of the default of the defendant in not authorising his discharge.

The first count of the declaration states, that the plaintiff was tenant from year to year to Sir Richard St. George, of certain premises comprising a dwelling-house, offices and land; that he owed his landlord a certain sum for rent; that the defendant, who was the agent of the landlord, had obtained judgment in an action of assumpsit for a sum which is averred in the declaration to have included the sum due for rent to the landlord; that under a *capias ad satisfaciendum* on that judgment the plaintiff was arrested and

(a) 2 Vent. 223.

(b) 10 B. & C. 664.

(c) Cr. & M. 89; S. C. 3 Tyrw. 26, G. C.

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imprisoned; and that being so imprisoned, he delivered possession of the premises of which he was so tenant, of certain crops, and also certain moveables, to the defendant as agent of the landlord, in full satisfaction and discharge of all damages, costs and charges of the defendant's judgment and of the poundage; and that the defendant accepted and received the same in full satisfaction and discharge of those damages, costs, charges and poundage, and agreed to inform the Sheriff by whom the *capias ad satisfaciendum* had been executed that the same was satisfied, and to give the Sheriff authority to discharge the plaintiff from custody under the writ. The declaration then alleges that the defendant, without reasonable cause, neglected and refused so to inform the Sheriff, and did not nor would so instruct him, or give him authority to release the plaintiff out of custody, by reason of which the plaintiff was detained in custody under the writ.

The second count differs from the first in this, that it alleges a delivery and acceptance only of the crops and moveables in satisfaction and discharge of the amount recovered by the judgment.

The third and fourth counts resemble the first and second respectively; save that after alleging the delivery and acceptance in satisfaction, each of these counts omits the statement of an agreement to discharge the plaintiff from custody; and instead of that statement, each of these counts contains an averment that the plaintiff was entitled to be discharged from custody, and that the defendant was bound to instruct and inform the Sheriff that the amount of the judgment was satisfied, and to give the Sheriff authority to discharge the plaintiff from custody under the writ; and each of these counts concludes in like manner as the first and second counts, by alleging the default of the defendant in not giving such instruction and authority.

The fifth count resembles the first, save that it states that the plaintiff was possessed of the premises, without stating that he was tenant, and omits the statement that the amount recovered by the judgment included the amount due to the landlord Sir Richard St. George.

The sixth count is a count on the terms of which no question arose.

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The defendant pleaded the general issue.

The case was tried before Mr. Justice BALL. There was a verdict for the plaintiff, and the case comes before us upon a bill of exceptions to the summing up and charge of the learned Judge.

At the trial, a good deal of evidence was given on both sides. It is necessary for me to advert to a small portion only of that evidence. On the part of the plaintiff, proofs were given, the tendency of which was to establish, that at a meeting between certain parties representing the plaintiff and the defendant, it was, on the 22nd of July 1846, agreed that the possession of the premises should be given, with certain property estimated at £185; that it was subsequently agreed that the property so estimated, or a part of it, should be withdrawn, and that the crops and moveables which were afterwards delivered should be substituted; that another meeting took place on the 24th of July, and that on the 27th of July, possession of the lands and premises was given (according to the language of the witness) "by sod and twig," and that possession was also given of the crops and moveables. It further appeared in evidence that, at the instance of the landlord, the plaintiff's attorney (who had formerly been the attorney for the landlord) said he would prepare an instrument which was to be executed by the plaintiff, the expenses of which the landlord promised to pay; and evidence was further given, tending to show that the parties contemplated the execution, by the landlord, of a release of the plaintiff from all arrears of rent. The plaintiff's attorney stated that the deed could not properly be executed while the plaintiff continued a prisoner. A draft of this deed was prepared by the plaintiff's attorney, and was afterwards engrossed, and both the drafts and the engrossment were read in evidence for the plaintiff. Each of these instruments recited an agreement between the plaintiff and the landlord Sir Richard Bligh St. George (not stating that the defendant was any party to such agreement), that the plaintiff should surrender the premises and transfer the crops and moveables to Sir Richard B. St. George; and the instrument, upon consideration of the plaintiff being released

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from the arrears, and being discharged from custody, purported to surrender the premises and transfer the crops and goods. Some parol evidence was given, upon which, as well as on the recital of the instrument, it was contended for the defendant, that a question arose for the jury, whether it was not a part of the agreement that a surrender should be made of the lands? And some evidence was also given, tending to show that the delivering and acceptance of the premises, and of the crops and moveables, was coupled with a condition that a valuation should be made of the crops and moveables; and the draft and engrossment of the intended deed contained a schedule of those articles, with their value annexed.

On the other hand, evidence was given to show that the delivery and acceptance of the premises, the crops and goods, were made in discharge and satisfaction of the judgment, and unaccompanied by any condition relative to the making of a valuation or the execution of a surrender.

With the view to the opinion which I have formed upon this case, and the reasons on which it is founded, I will assume that evidence was given on which a question did arise for the jury, whether it was agreed between the parties that a surrender should be executed by the plaintiff of the premises which he held under Sir Richard St. George?

The learned Judge (after stating to the jurors what was averred in the pleadings) left four questions to be considered by them:—First, whether the possession of the land and the delivery of the crops was so given as averred? secondly, was the possession of the land and delivery of the chattels, as averred in the declaration, accepted by the defendant in discharge of the debt? thirdly, did the defendant thereon undertake to discharge the plaintiff from custody? fourthly, did he fail to perform his undertaking? And the jury were in effect directed to find for the plaintiff, if they were of opinion in the affirmative of these questions.

To convey these questions to the jury, and in giving that direction, the learned Judge added observations for the guidance of the jury, to which I shall advert hereafter.

The defendant's Counsel tendered eight exceptions to the charge

of the learned Judge; on two of them chiefly (the second and the fifth) the argument before us proceeded; and I think it is not denied that, if these exceptions cannot be sustained, the others must share their fate, and be, with them, overruled.

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These two exceptions were as follow :—"That if the jury "believed it was part of the agreement that the plaintiff should "surrender to Sir Richard Bligh St. George the lands in the declaration mentioned, they should find a verdict for the defendant, "inasmuch as no sufficient evidence was given to establish that "the plaintiff had so surrendered the lands; but the said Justices "refused so to inform the said jury, or to give them any such "direction as last aforesaid.

"That Counsel for the said defendant then and there further "required the said Justices to inform the said jury, that if the jury "believed that it was part of the agreement between the plaintiff "and the defendant, mentioned in the first and second counts of the "declaration, that the plaintiff should surrender to Sir Richard "Bligh St. George the lands in the declaration, and transfer to him "the absolute ownership and possession of the crops and other "chattels in the said counts mentioned, that they should find for "the defendant on those counts; inasmuch as such agreement was "different and variant from, and did not correspond with the "agreement stated in the said two first counts of the said declaration mentioned, and that they should find a verdict on said two "first counts for the said defendant; but the said Justices refused "so to inform the said jury."

If the case rested there, I have no hesitation in declaring my own individual opinion, that I could not acquiesce in upholding the verdict. If the exception had not been taken, I should indeed be of opinion, that as the finding of the jury was in effect that the things delivered were both given and accepted in full satisfaction of the judgment, that finding concluded the fact that any thing else was contemplated or agreed on by the parties, as a matter to be done, with any view to that full satisfaction. If any thing else was so contemplated, then what was in fact given and accepted was not in full satisfaction. If what was given and accepted was so given

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and accepted in full satisfaction, then nothing more was needed fully to satisfy. Every satisfaction of necessity implies an accord; for it is not the giving and taking only, but the giving and taking with a mutual agreement or accord, that the thing delivered shall be given and accepted in satisfaction, that makes the dealing between the parties to operate as a satisfaction. If therefore the premises, the crops and the moveables, were delivered and accepted in full satisfaction of the judgment, they were given and taken upon an accord or agreement, which included a surrender, and every other matter, or any essential part of that dealing between the parties.

But although, in my judgment, this must be so by necessary implication, and although I should feel bound to presume that the Judge instructed the jury in conformity with this view, if nothing else appeared, I should be of opinion, if he was pointedly called upon to leave it a question to the jury, whether the execution of a surrender by the plaintiff formed part of the agreement? and if the evidence fairly raised that question (as in the present case, whatsoever was the weight of the evidence, I think it did), that he ought to have submitted that question pointedly for the consideration of the jury. While we guard against a surprise, either upon the Judge or upon the parties, by requiring that an objection to the charge should be precise and specific, it appears to me to be of no less importance to secure also to the parties the privilege of having a material question, on which they rely, and which fairly arises on the evidence, so left to the jury as, if possible, to prevent all misconception. And I should be very slow to call in aid a general finding, which, if there were no controversy, might in plain intendment be understood as including all the elements that were essential for the result at which the jury arrived, for the purpose of helping the verdict by that intendment, where one of those elements was presented pointedly for consideration to the Judge, and not by him so presented, for their consideration, to the jury.

But in the present instance, the charge is not confined to the presenting to the jury the questions which I have stated. Those questions were left to the jury with observations and directions which appear to me to conclude the possibility of misconception,

and, though in different words, to meet the very point of the exceptions. T. T. 1847.  
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The learned Judge, after stating the averments, and stating the questions which I have before mentioned, proceeds thus:—"That POWER  
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"as to the giving of the possession and acceptance thereof by  
"the defendant, they would consider, was it an absolute giving  
"and acceptance or was it conditional, to depend upon certain  
"acts being done by the plaintiff? If they were of opinion that  
"possession was given and accepted without any condition, in  
"discharge of the debt, then the averment to that effect in the  
"declaration was proved; but if they were of opinion that it was  
"conditional, to depend on certain acts to be done by the plaintiff,  
"and that such acts were not done, then it was the same as if  
"no possession at all was given, and the plaintiff must fail. And  
"that it was for them to decide whether the valuation was completed  
"and acquiesced in by the defendant; and that if they were of  
"opinion that it was so acquiesced in, and that the defendant  
"accepted the possession as then given, and valuation of the crops  
"as then made, and that he then agreed to discharge the plaintiff,  
"the averment to that effect in the declaration would be sus-  
"tained."

Now, what other acts were, upon the evidence, suggested as acts which were to be done by the plaintiff? This, and this only, the making of the valuation and the execution of a surrender. The Judge, in his charge, pointedly and positively enjoins the jury to find that there was no delivery and acceptance in satisfaction, if there was any thing else to be done by the plaintiff for satisfaction, save the delivery of that which was averred in the declaration to have been given and received, namely, the possession of the premises and the crops and moveables. And the result appears to me to be inevitable, that the jury, by their findings upon the two first questions, made under the directions so given them by the Judge, expressly, without ambiguity and without risk of any possible misconception of their meaning, excluded the idea of a surrender as contemplated by the parties, in the accord upon which the satisfaction was had.

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One of the two exceptions with which I have been dealing was applied to the two first counts, containing the statement of an agreement to discharge the plaintiff from custody. The other exception was applied to all the counts. I apprehend that the same rule must apply to both exceptions. In the view which I take of this record, the difference, in frame, between the first, second and fifth counts, and the third and fourth, is wholly immaterial. It has been assumed in the discussion at both sides (and upon this argument on a bill of exceptions it must be so assumed), that the delivery and acceptance, if made in satisfaction of the judgment, did in effect extinguish the judgment debt. Whether it did, or did not, is not a question now open before us. But assuming that it did, then without any express agreement to discharge, it is, in my opinion, perfectly clear that a duty was cast upon the defendant by the law, to do what was necessary on his part to effect the discharge of the plaintiff from custody. On this point *Crozier v. Pilling* (a) is a direct authority. The legal obligation was, in my opinion, complete on the satisfaction of the judgment. It appears to me that, with a view to this action on the case, the express agreement to perform that obligation formed no essential part of the cause of action, which, before any such agreement was completed is the duty resulting from the satisfaction of the judgment. This is not a case in which, as in *Boorman v. Brown* (b), it was necessary, in order to sustain the action, to show that there was superadded to the general duty of a broker an express contract enlarging and qualifying the general duty by a specific delegation to perform that duty in a particular way. There it was necessary to show the superadded contract, in order to found a right of action for the breach of the specific obligation; but in the present case the duty arose from a legal liability irrespective of any contract, save that accord which formed part of the act by which the judgment was satisfied.

A good deal of the argument was applied to the form of the pleading; to the averments in the declaration, showing the acceptance and delivery in satisfaction; and to the alleged vagueness of the

(a) 4 B. & Cr. 26; S. C. Dowl. & Ry. 129.

(b) 3 Ad. & Ell. N. S. 511; S. C. 11 Cl. & Fin. 1.

questions presented to the jury, founded on the alleged vagueness of the allegations in the pleadings: and it was contended that the contract or agreement for the acceptance and delivery ought to have been set forth in the pleading, or at least ought to have been expounded in the charge.

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If this argument, as applied to the pleadings, were material, it is answered by a long line of authorities, and by the constant course of precedent, in setting forth in pleading an accord and satisfaction, ever since *Peyton's case* (a). The usual course has been not to set forth fully the accord, and to confine the averment to the simple statement that the matter which is the subject of the alleged satisfaction was given by one party in satisfaction, and was in satisfaction accepted by the other. The two allegations are essential, both together import a concurrent act, and a mutual meaning. The allegation, brief and intelligible, includes an accord and an act done in conformity with it, amounting to satisfaction. The mode of so stating the transaction between the parties has been recognised and approved of in some modern cases, which I shall merely cite without further reference to them: *Webb v. Weatherly* (b); *Stead v. Poyer* (c); and *De Wolf v. Bevan* (d). The old cases are collected in *Com. Dig.* tit. *Accord*, and also in *Bacon's Abridgement*, same title.

In this instance, at least, I believe the terms used in pleading are conformable with the ordinary language and common understandings of men. If I offer my creditor one thing, saying that I do so in full satisfaction of my debt, and if he means to insist on two, I believe his answer will be promptly given, without the least risk of his misunderstanding the import of my offer; he will at once reject the one if it be not accompanied by a tender of the other.

On the whole, I am of opinion that the exceptions ought to be overruled.

PENNEFATHER, B.

After the observations in this case which my LORD CHIEF BARON has so ably made, I should not think it necessary to say a word

(a) 9 Coke, 80, 86. (b) 1 Bing. N. C. 502; S. C. 1 Scott's Rep. 477.  
(c) 1 M. Gr. & Scott, 782. (d) 13 M. & W. 160.

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more than that I concur in the judgment of the Court, if I did not feel some little doubt upon the subject. In order to explain the view I take of the case, it is unnecessary to refer to the pleadings, which have been so minutely and so exactly stated, nor to go through the exceptions or Judge's charge.

I think that there was evidence in this case to go to the jury, that to complete the accord and acceptance of the satisfaction, it was the intention of the parties that the premises should be surrendered to the defendant. I think, therefore, that it was necessary for that ingredient to be taken into consideration by the jury in forming their opinion. The defendant, I may say, had obtained a judgment against the plaintiff; that judgment was not discharged; it was alleged that it was discharged by the collateral agreement to give up the farm and certain valuable chattels on the farm, and as the defendant alleges, surrendering the farm was a part of the agreement; there was evidence that the surrender constituted a part of it, and inasmuch as it did, there was not a duty cast on the plaintiff in that action, unless that portion of the matter agreed on was actually performed; and therefore, I think that question ought to have been submitted to the jury. And the only question which appears to any of us to arise in the case is, whether that question was submitted to the jury? The counts in the declaration do not contain any mention of the surrender, or any allusion to that forming a part of the arrangement by which this judgment was to be satisfied. The second exception insists that the learned Judge should direct the jury, that if they believed that it was part of the agreement that the plaintiff should surrender to Sir Richard Bligh St. George the lands in the declaration mentioned, they should find a verdict for the defendant, inasmuch as no sufficient evidence was given to establish that the plaintiff had so surrendered the lands.

Now, it is to be considered, whether the Judge has substantially left that question to the jury? I take it, an exception ought to be such as to bring the matter before the minds of the Court; of the Judge; it is for the interest of the party, for the Judge cannot be supposed to have any interest in the matter; and unless the excep-

tion brings the matter pointedly before the mind of the Judge, the parties cannot have the benefit of their exception otherwise. The Judge is not bound, in his charge to the jury, to use the words suggested by Counsel, but substantially to leave the question to them.

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Now the part of the charge which falls under these observations is the second and third direction of the learned Judge. The first question submitted to the jury is, whether the possession of the land and delivery of the crops was so given as averred? Secondly, was the possession of the land and delivery of the chattels as averred in the declaration accepted in satisfaction of the debt—that is, was the debt agreed to be discharged by the delivery of the possession of the matters as stated in the declaration? The third is, did the defendant thereon undertake to discharge the plaintiff from custody—that is, did he on receiving possession of the land and other matters agree to discharge the plaintiff? If there was the third ingredient, the surrender of the land, he could not have agreed to discharge the plaintiff on the terms mentioned in the declaration; but the exception comes after this direction, and requires the Judge to tell the jury that if they believed the surrender of the lands constituted part of the agreement between the plaintiff and defendant, they should find for the defendant, inasmuch as no sufficient evidence was given to establish that the plaintiff had so surrendered the lands.

Now that coming after direction of the learned Judge, without further observation, leaves some doubt on my mind that that matter was left to the mind of the jury. I cannot remove from my mind some doubt that that question was not left to the jury. I would say that the exception ought to be overruled; but still it is unsatisfactory to my mind. With regard to the latter part of the charge, to which my LORD CHIEF BARON has referred as influencing his mind, I think I am bound to state why it appears to me that the latter part of the charge does not remove from my mind these doubts which I entertain upon the other part. Now the conclusion of the charge is this: “And the said learned Judge further told the jury, that as to the “giving of the possession and the acceptance thereof by the defendant, they would consider was it an absolute giving and acceptance, “or was it conditional, to depend upon certain acts being done by

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"the plaintiff? If they were of opinion that possession was given and  
"accepted without any condition in discharge of the debt, then the  
"averment to that effect in the declaration was proved; but if they  
"were of opinion that it was conditional, to depend on certain acts  
"to be done by the plaintiff, and that such acts were not done, then  
"it was the same as if no possession at all was given, and the plain-  
"tiff must fail." Now it does not appear to me that those acts  
could have been understood at the time as a surrender, as there was  
some evidence that if those acts were not done, the possession was to  
be given back; and it does not appear to me that, taking the latter  
part of the charge and the exceptions into consideration, the am-  
biguity which has been suggested was cleared up. It appears to  
me, upon the question of the Statute of Frauds, that this agreement  
was to be considered as a contract executed, and not an executory  
one, and the defendant who has derived the full fruits and benefit  
of it could not be allowed to rely on the Statute of Frauds.  
Although I concur in the judgment which has been pronounced, I  
own that my mind is not as well satisfied with the case as I would  
wish.

RICHARDS, B.

As I understand the learned Judge, he left the questions substan-  
tially to the jury; he certainly did not leave them in the very words  
of the exceptions. But it is unnecessary for me to say more than  
that I concur in the judgment of the Court.

LEFROY, B.

From my concurrence in the judgment which has been pro-  
nounced, I should not occupy any time in saying more than that  
I concur in it; but that I think that it is a case involving a very  
important principle, as to the mode in which exceptions should be  
taken, and in which they may be sustained. The principle is this:  
if the Judge in terms calls the attention of the jury to the questions  
to be decided by them, if the terms of the Judge's charge are large  
enough to embrace them, whether the defendant is entitled to select  
a single item, and call on him to put that as a distinct question to  
the jury? Now, I hold that he is not.

The question then is, has not the Judge, in the present instance, put the case to the jury so as to embrace every part of the case which the defendant has made? The record states that the Judge charged the jury. Now, what is the meaning of charging the jury? He states to the jury the case which the plaintiff has made; he calls the attention of the jury to the case made by the declaration—that the plaintiff by his declaration complained that he had put the defendant into possession of the lands, and had delivered up crops and other valuables in full satisfaction of the debt, and that the defendant had accepted the possession of the lands and delivery of the chattels in full satisfaction and discharge of the said debt; and that the defendant thereon undertook to discharge the plaintiff from custody, but had not done so. Now, what does that amount to? What is the case made by the declaration? That the plaintiff had delivered two things in full satisfaction of the debt, and that the defendant had agreed to accept two things in full satisfaction of the debt, and that thereupon the defendant undertook to discharge the plaintiff from custody; the Judge goes on to say “that it was for them to decide upon the evidence;” and the argument of the defendant is, that there was evidence to go to the jury of a third thing to be given, in order to constitute a satisfaction of the debt. The Judge left it to the jury—first, to say “whether the possession and the delivery of the crops was so given as averred?”—that is, whether it was given in full satisfaction; and secondly, “was the possession of the land and “delivery of the chattels, as averred in the declaration, accepted by “the defendant in discharge of the debt”—that is, was it accepted in full satisfaction, as averred? Now, what is that? Is it imaginable that if the jury are told upon their oaths, upon which they are bound to find, that if a third thing was to be given and accepted in full satisfaction, the plaintiff has not proved his case? If when two things were only given, and three things were to be given, is it imaginable that they could find that the two things were given in full satisfaction if the three things were to be given? It appears to me as evident, as necessary, that the jury must have decided that question.

If a charge so comprehensive as that which we are considering

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T. T. 1847. does not embrace the question, I do not know how a Judge can  
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 ST. GEORGE. to ask the jury is number one part of the satisfaction, and so on.  
 Unless it is to be so I cannot, I confess, see how a Judge is to charge  
 otherwise than as the learned Judge has here done. I therefore own  
 that my opinion is in favour of the plaintiff upon that view of the  
 case, and totally denying the right of the defendant, where there was  
 a comprehensive charge embracing the question which he desires to  
 have put, to single out a particular item and to say "you must give  
 a special charge on that point;" or to say that where the Judge has  
 called the attention of the jury in point of fact to that question, that  
 he is to call on them to give an opinion upon that particular point.  
 Then, if the Judge has called the attention of the jury to that point,  
 there is an end to that part of the case, and I may, I think, say  
 almost to the whole of it. As to the question arising in this case  
 upon the Statute of Frauds, this action is not brought upon an  
 executory contract, but on a contract executed. The duty arose out  
 of a contract executed, and it is remarkable that at the trial parol  
 evidence of the agreement to give possession was not objected to.  
 As Lord Ellenborough says in *Crosby v. Wadsworth* (a) "the con-  
 tract is not wholly void under the statute, merely on account of its  
 "being by parol; so that if the same had been executed, the parties  
 "could have treated it as a nullity." As, suppose a man agrees to sell  
 timber standing, and that the plaintiff shall have a right to enter and  
 cut it down, it is quite plain that the agreement will be within the  
 statute; but suppose he cuts it down, then he may bring trover for  
 the timber. So here, while ever the matter rested in contract, no  
 right of action could arise; but the moment possession of the lands,  
 pursuant to the contract, was given, then the right of action arose.  
 That constitutes the whole of the reasoning of Lord Ellenborough in  
*Crosby v. Wadsworth*. As my Brother PENNEFATHER has suggested,  
 there is all the difference in the world between a contract ex-  
 ecuted and one which is only executory. Here it was not on

(a) East, 600.

the agreement to discharge the plaintiff that the defendant's liability rested. He might have repudiated the contract; but the moment it was executed, his right to repudiate it was gone. When it is only to vindicate the non-performance of a contract you bring your action, the Statute of Frauds is in your way, as he, the plaintiff, had brought an action for the defendant's not discharging him pursuant to the contract. I quite concur with my LORD CHIEF BARON that the agreement here is merely a matter of legal inference, for the agreement is only what the law would imply from the satisfaction of the debt. On the whole, therefore, my mind has come to a very positive conclusion that the plaintiff is entitled to judgment.

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Exceptions overruled.

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v.

THE LORD BISHOP OF CORK, EDWARD WILSON and  
THE REV. WILLIAM WILSON, Clerk.

Easter Term.  
May 10.

Trinity Term.  
May 30,  
June 3, 6, 14.

(Common Pleas.)

In *quare impedit* at the suit of a collateral relative of the first purchaser, the former must show how he is *consanguineus et hæres* to the latter, but, in doing so, it is not necessary for him to account at each step for all the

lineal descendants respectively (other than those upon whose seisin he relies) of the persons through whom he traces title to himself.

A count in *quare impedit* at the suit of the Crown commenced by alleging that Mary Fitzgerald and her husband were seised as of fee and of right to them and the heirs of Mary, in her right, of an advowson in gross, and then traced its descent through her eldest son, who presented, and died without issue, then through her second son, who died without issue, and then through her third son, who died in 1837 without issue, leaving W. E. Fitzgerald his heir-at-law *ex parte maternâ*, as cousin. W. E. Fitzgerald being a Roman Catholic, the Crown now claimed in his right. The count traced his descent through several intermediate steps, from Margaret Barry, the only daughter of James Barry, by Mary Cunningham his wife, grand-daughter of Giraldus Barry by her mother, the daughter of Giraldus Barry; and it stated that the daughter of Giraldus Barry died without other issue than Mary Cunningham and her issue, and that said James Barry and Mary his wife died without other issue of them or either of them than the issue of Margaret Barry their daughter. It next showed the descent of James Barry, by stating that he was the eldest son of James Fitz Robert Barry, who was second brother of Giraldus Barry, and the son of one Robert Barry. It then showed the descent of Mary Fitzgerald (with whose seisin and that of her husband it had commenced) from Giraldus Barry, and alleged that at the occurrence of the vacancy "there was no other issue or lineal descendant of Giraldus Barry save and except the issue of James Barry and Mary his wife." To this count the defendants demurred, assigning as cause—first, that there was no direct averment of the exhaustion of the issue of Mary Fitzgerald; secondly, that the allegation, that at the occurrence of the vacancy "there was no other issue or lineal descendant of Giraldus Barry save and except the issue of James Barry and Mary his wife," was argumentative and tendered an immaterial issue; and thirdly, that the seisin alleged in John and Mary Fitzgerald was improperly laid, because it did not show the commencement of the estate to John and Mary and the heirs of Mary. The Court overruled all the grounds of demurrer.

A count in *quare impedit* alleged a presentation to the vicarage of D, and afterwards a presentation of the same clerk by the same patron to the rectory of D., and

upon admitted, instituted and inducted to the rectory; that afterwards, in the same year, the vicarage and rectory were united and consolidated by the Bishop of Cloyne, with the consent of Giraldus Barry. This count then stated that Giraldus Barry died on the 1st of March 1645, upon which event his eldest son John Barry became seised in fee of the advowson; that upon his death, on the 25th of August 1677, his nephew and heir-at-law Robert Barry, the son of David Barry, who was second son of Giraldus, became seised in fee of the advowson, and that on his death, on the 4th of March 1696, his eldest son David Barry became seised; David dying on the 1st of May 1720, his eldest son Patrick James Barry became seised, and on the 1st of January 1760 died, leaving an only child, Mary Barry, who became seised, and on the 1st of June 1770 married John Fitzgerald, whereupon they both became seised; that Mary died on the 1st of June 1793, and her husband died on the 9th of January 1800, whereupon their eldest son James Fitzgerald, as heir of Mary and thereby of Giraldus, became seised to him and his heirs *ex parte*

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stated a subsequent consolidation of the vicarage and rectory, and from that point proceeded for the union.—*Held*, that the defendants may by one plea specially traverse the presentation to the vicarage, and by another specially traverse the presentation to the rectory.

A declaration in *quare impedit*, in the deduction of title, alleged "that A was the only daughter of B." A special traverse "without this, that A was the only daughter of B," is not too large, and does not tender an immaterial issue.

Where a count in *quare impedit* alleged a seisin in fee of an advowson in one Sovereign and a presentation by him, and that he died so seised, whereupon his successor became seised;—*Held*, that a plea which did not show any termination of the seisin of the former Sovereign, and which specially traversed the seisin of his successor, was ill, inasmuch as it traversed a conclusion of law.

In *quare impedit*, the rule against counterpleading the title of the plaintiff, where the defendant does not aver any title in himself, is not limited to the pleas of the clerk and ordinary, but applies to the pleas of any defendant who does not allege title in himself; and this is so, although in fact his clerk be in possession.

In *quare impedit*, pleas by way of special traverse by either the alleged patron or his clerk, albeit that the latter has been admitted, instituted and inducted, must *pro forma*, as inducement, show a title in the alleged patron, inconsistent with that of the plaintiff. A general and vague averment of seisin in the alleged patron and his ancestors will not be sufficient. The principal object of this rule is the restriction of the defendants to the production of such evidence only under those pleas as is consistent with their title, as specially set forth in the inducements.

Where pleas in *quare impedit* have upon demurrer been overruled, the defendant, if he seek to amend, must give notice of a motion for the purpose, and must supply the plaintiff with a list of the proposed amendments.

The rule, that the Crown neither pays or receives costs, does not apply to cases in which, either on its part, or on that of the opposite party, a favour is sought from the Court; *ex gr.* on a motion by the defendant, in a suit by the Crown, for leave to amend some of many pleas, to all of which a demurrer had been allowed, the Court permitted him to do so, only however upon the terms of paying the costs attendant upon the demurrer to all, and the costs of the motion.

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*maternâ*, as of fee and of right of the advowson; and that the church having become vacant in 1805, he, on the 9th of September in that year, presented as his clerk Matthew Purcell, who was afterwards, on the 8th of July 1808, admitted, instituted and inducted to the united rectory and vicarage of Dungourney, and filled it until his death. This count further stated, that on the 9th of July 1809, James Fitzgerald died without issue, leaving his next brother Bartholomew, son of Mary Fitzgerald, his heir-at-law, who then became seised, and died in 1809 without issue, leaving his next brother John, son of Mary Fitzgerald, and commonly called "Major Fitzgerald," his heir-at-law, who became seised, and in 1837 died without issue, leaving William Edward Fitzgerald his heir-at-law *ex parte maternâ*, as cousin, who being a Roman Catholic, the advowson vested by the statute in her Majesty, her heirs and successors, until the conformity of William Edward Fitzgerald or his right heir; and that on the 20th of June 1845 the church became vacant by the death of the incumbent Matthew Purcell; William Edward Fitzgerald "then and there being the "heir-at-law *ex parte maternâ*, as cousin of said John otherwise "Major Fitzgerald, and being heir-at-law of the said Giraldus "Barry: that is to say, and her Majesty's Attorney-General saith, "that at the time of the death of the said John Fitzgerald, who "was commonly called Major Fitzgerald, brother of said James "aforesaid, the said William Edward Fitzgerald was the eldest son "of one James Fitzgerald then deceased, who was the eldest son of "one William Fitzgerald then deceased, who was the only son of "one James Fitzgerald then deceased, who was the eldest son of "one Margaret Barry otherwise Fitzgerald then deceased, who "was the only daughter of one James Barry of Ballydona by "Mary Cunningham otherwise Barry his wife, whose mother, "then deceased, was the only daughter of said Giraldus Barry, "and of which said daughter of said Giraldus there was no issue "save the issue of her said daughter Mary so married to said James "Barry of Ballydona, which said James and Mary his wife were "then both deceased, without other issue than the issue of said "Margaret Barry their daughter surviving, which said James Barry

"of Ballydona was the eldest son of one James FitzRobert Barry  
 "then deceased, who was the son of one Robert Barry, and was the  
 "second brother of the said Giraldus Barry, who so presented as  
 "aforesaid. And her Majesty's Attorney-General further saith,  
 "that at the time of the death of the said Matthew Purcell there  
 "was no issue or lineal descendant surviving of the said Giraldus  
 "Barry, save and except the issue of the said James Barry of Bally-  
 "dona and Mary Cunningham aforesaid his wife, by virtue of which  
 "premises the said William Edward Fitzgerald then and there was  
 "and now is in manner aforesaid heir-at-law of the said Giraldus  
 "Barry, and thereby the heir-at-law *ex parte maternâ* of the said  
 "John otherwise Major Fitzgerald."\* This count then alleged the  
 popery of William E. Fitzgerald, and that, therefore, and by virtue  
 of the 17 & 18 *Car. 2 (Ir.)* and 2 *Anne (Ir.)*, the right of presenta-  
 tion to the church of Dungourney belonged to her Majesty, but that  
 she was hindered by the defendants.

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The second count commenced by alleging that, "On the 1st of  
 "December 1786, John Fitzgerald and Mary Fitzgerald, otherwise  
 "Barry, his wife, were seised as of fee and of right to them, and  
 "the heirs of said Mary, in right of the said Mary Fitzgerald, other-  
 "wise Barry, of the advowson of the united rectory and vicarage  
 "of, &c., as of an advowson in gross of itself, and afterwards, to  
 "wit, on the 1st of June 1793, the said Mary Fitzgerald died, to  
 "wit, at, &c., so seised of the said advowson, leaving her son and  
 "heir James Fitzgerald her surviving; and afterwards, to wit, on  
 "the 9th of January 1800, the said John Fitzgerald died, to wit,  
 "at, &c., by virtue of which premises the said advowson descended  
 "upon the said James Fitzgerald as son and heir of the said Mary,  
 "who thereby became seised of the said advowson as of fee and of  
 "right to him and his heirs *ex parte maternâ*." It next alleged the  
 presentation of Matthew Purcell by James Fitzgerald in the same  
 manner as in the previous count, and then proceeded thus:—  
 "Afterwards, to wit, on the 9th of July 1809, in, &c., the said  
 "James Fitzgerald died seised of the said advowson as aforesaid

\* For Pedigree, see next page.

# pedigree

OF

WILLIAM EDWARD FITZGERALD, AS ALLEGED BY THE CROWN.

Robert Barry.

Giraldus Barry.

James FitzRobert Barry.

John Barry.

David Barry.

James Barry.

Mrs. Cunningham.

Robert Barry.

Mary Cunningham (*m.*) James Barry, of Ballydona.

David Barry.

Margaret Barry (*m.*) Fitzgerald.

Patrick James Barry.

James Fitzgerald.

Mary Barry (*m.*) John Fitzgerald.

William Fitzgerald.

James Fitzgerald.

Bartholomew Fitzgerald.

John (Major) Fitzgerald.

William Edward Fitzgerald.

James Fitzgerald.

“without issue, leaving Bartholomew his next brother his heir-at-law *ex parte maternâ*, upon whom the said advowson thereupon descended, and who thereby became seised thereof as of fee and of right; and afterwards, to wit, on the 12th of December 1809, at, &c., the said Bartholomew died without issue, leaving his next brother, John, commonly called Major Fitzgerald, his heir-at-law *ex parte maternâ*, upon whom the said advowson thereupon descended as of fee and right, and who thereby became seised thereof to him and his heirs *ex parte maternâ*, and afterwards, to wit, on the 1st of October 1837, the said John, at, &c., died without issue, leaving William Edward Fitzgerald his heir-at-law in manner hereinafter mentioned.” It then alleged his popery and the consequent vesting of the advowson in the Crown until his conformity, or that of his right heir, and then proceeded thus:—“And afterwards, to wit, on the 20th day of June, A. D. 1845, the said last mentioned united rectory and vicarage became vacant by the death of said Matthew Purcell, to wit, in, &c., the said William E. Fitzgerald, then and since being the heir-at-law as cousin of said Mary Barry, otherwise Fitzgerald, and thereby being the heir-at-law *ex parte maternâ* as cousin of the said John Fitzgerald, commonly called Major Fitzgerald, that is to say, and her Majesty by her Attorney-General saith, that the said William E. Fitzgerald, at the time of the death of the said John, otherwise Major Fitzgerald, then was and is the eldest son of one James Fitzgerald, then deceased, who was the only son of one William Fitzgerald, then deceased, who was the only son of one James Fitzgerald, then deceased, who was the eldest son of one Margaret Barry, otherwise Fitzgerald, then deceased, who was the only daughter of one James Barry of Ballydona, then deceased, by Mary Cunningham, otherwise Barry his wife, grand-daughter of one Giraldus Barry, by her mother, then deceased, the daughter of said Giraldus, which said daughter of Giraldus was then deceased, without other issue than the said Mary Cunningham and her issue, which said James Barry of Ballydona and his said wife were then deceased, without other issue of them, or either of them, than the issue of said Margaret Barry her

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"said daughter, which said James Barry of Ballydona was the  
"eldest son of one James FitzRobert Barry, then deceased, who  
"was the son of one Robert Barry, and was the second brother of  
"the said Giraldus Barry, then deceased, which said Giraldus,  
"besides his said daughter, left issue only three sons, John, David  
"and James Barry, which said John and James Barry last men-  
"tioned were then deceased, and of whom there was then no issue ;  
"and which said David Barry was then deceased, having left issue  
"a son and heir, Robert Barry, which said Robert Barry, then  
"deceased left issue an eldest son and heir David Barry, then  
"deceased ; which said David Barry left issue an eldest son and  
"heir Patrick James Barry, which said Patrick James Barry, then  
"deceased, was the father of the said Mary Barry otherwise Fitz-  
"gerald his only child, who was as such his heiress-at-law, and which  
"said Mary Barry, otherwise Fitzgerald, was the mother of the said  
"James Fitzgerald, who after her decease, and as her heir-at-law  
"as aforesaid, was so seised of said advowson, and presented to the  
"said church as aforesaid. And her Majesty's Attorney-General  
"saith that, at the time of the death of the said Matthew Purcell  
"there was no other issue or lineal descendant of said Giraldus  
"Barry, save and except the issue of said James Barry of Bally-  
"dona, and Mary his wife ; and that said William E. Fitzgerald  
"then and there being as aforesaid the heir-at-law of said Mary,  
"and thereby being the heir-at-law *ex parte maternâ* of said John,  
"otherwise Major Fitzgerald as aforesaid, was, and all his lifetime  
"hath been and still is, a person professing the Roman Catholic  
"religion." The count then relied on the popery of William E.  
Fitzgerald, and the statutes 17 & 18 *Car. 2 (Ir.)* and 2 *Anne (Ir.)*,  
as vesting the right of presentation in her Majesty the Queen, and  
concluded in the usual form.

The third count followed the language of the first count as far as  
the consolidation of the vicarage and rectory ; it then stated the  
seizure and sequestration of the advowson subsequently to the 23rd  
of October 1641, and previously to the passing of the Act of  
Settlement, to the use of the Crown in the time of the great Rebel-  
lion which broke out on the 23rd of October 1641 ; that Giraldus

Barry was an innocent Papist within the meaning of the Act of Settlement; that on the 1st of March 1641, and previously to the sequestration, he died, leaving John Barry his eldest son and heir, who thereby became possessed of the advowson; and afterwards King Charles the Second became seised by virtue of the sequestration and of the statutes in that behalf made; and subsequently, on the 1st of June 1661, presented as his clerk James Bruce, who was duly admitted, instituted and inducted; that John Barry being an innocent Papist, he exhibited his claim before the Commissioners for carrying into execution the Act of Settlement, and that the advowson was in due form of law restored to him. The count then stated, that by the statute 17 & 18 *Car. 2 (Ir.)*, the advowson was in the year 1667 vested in the Crown, until the conformity of John Barry or his heirs, and so continued until the conformity of James Fitzgerald, afterwards in that count mentioned; that a vacancy having occurred in the twenty-seventh year of King Charles the Second, he presented, as his clerk, Anthony Egan, who was admitted, instituted and inducted. After stating the death of John Barry in 1677, this count traced the title through Robert Barry, David Barry, Patrick James Barry, and Mary Barry otherwise Fitzgerald, in the same manner as in the first count, averring them however to have been Roman Catholics. It next alleged that James Fitzgerald, the eldest son and heir of Mary Barry, being a Protestant, and having complied with the several requisites by law necessary for enabling the heirs of Roman Catholics to present to advowsons, became seised to him and his heirs *ex parte maternâ*. The presentation of Matthew Purcell was set forth as in the first count, which from that point to the end varied in no important respect from this count.

The fourth count stated that on and before the 22nd of October 1641, Giraldus Barry was seised in fee of the castle, town and lands of Dungourney, to which the advowson of the united rectory and vicarage of the church of Dungourney was then appendant. This count then proceeded as in the third count, from the sequestration on account of the rebellion, down to the vesting of the advowson, as one in gross in the Crown, until the conformity of John Barry or his

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heirs. It then, having stated the presentation and induction of Anthony Egan, by Charles the Second, alleged that by an indenture of feoffment on the 1st of May 1666, made between John Barry and David Barry of the one part, and one William Fitzgerald of the other part, John Barry conveyed to William Fitzgerald in fee the castle, town and lands of Dungourney, separate from the rectory and vicarage. After stating the death of John Barry in 1677, the count proceeded in the same manner as in the third count down to the presentation of Matthew Purcell, by James Fitzgerald; from that point it in substance followed the first count down to the allegation that James FitzRobert Barry was the son of Robert Barry, and the next brother of Giraldus Barry. It then stated that Giraldus Barry left issue, besides his said daughter, only three sons, John and David aforesaid, and James then deceased, without issue; "and that at "the time of the death of John, otherwise Major Fitzgerald, there "was no other issue or lineal descendant, besides the said John "Fitzgerald, surviving, of the said Giraldus Barry, save the issue of "said James Barry of Ballydona, and his said wife as aforesaid; by "virtue whereof the said William Edward Fitzgerald then was and "still is heir-at-law of said Giraldus Barry, and as such in manner "aforesaid heir-at-law *ex parte maternâ* of the said John Fitzgerald, "the brother of said James Fitzgerald, who so presented the said "Matthew Purcell as aforesaid." It then averred the popery of William Edward Fitzgerald, and concluded similarly to the first count.

The fifth count was in substance that on the 1st of February 1720, King George the Second was seised of the advowson in gross to him, his heirs and successors, in right of his Crown, as of fee and of right, of the united rectory and vicarage of Dungourney; and that on the 1st of February, in the fifteenth year of his reign, the church having become vacant, he presented Richard Southwell his clerk, who on such presentation was admitted, instituted and inducted upon the 17th day of the same month; and that George the Second died seised in 1760, whereupon the advowson descended upon George the Third, grandson and heir of George the Second, by virtue whereof George the Third was seised of the advowson to him,

his heirs and successors, in right of his Crown, as an advowson in gross by itself, as of fee and right, and on the 29th of January 1820 died so seised, leaving George the Fourth his son and heir and successor, who in like manner became seised of the advowson in gross to him, his heirs and successors, and died on the 26th of June 1830. It then traced the title in a similar manner through William the Fourth down to her present Majesty, alleging a seisin in them respectively, exactly as previously averred with respect to George the Fourth.

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The sixth count stated that on the 1st of March 1786, King George the Third was seised of the advowson in gross of the united rectory and vicarage of Dungourney, as of fee and right, to him, his heirs and successors; and that upon the occurrence of a vacancy at that time he presented Francis Orpen, who was on the 1st of April following admitted, instituted and inducted; having mentioned that George the Third died seised in 1820, it followed the title through his successors upon the throne down to her present Majesty, in the same manner as in the fifth count.\*

To the second count of the declaration the defendant William Wilson demurred. The points relied on were, firstly, that it appeared by that count that Mary Fitzgerald and John Fitzgerald were the purchasers of the advowson, and on the statement in that count must be taken to be such; yet the plaintiff, tracing his descent from a remote ancestor of Mary Fitzgerald, did not show, except argumentatively and by inference, that her descendants are exhausted; nor did the count contain any positive or apt averment that Mary Fitzgerald died without other issue than James, Bartholomew and John, nor did it appear that there was not, at the time of issuing the writ in this cause, a lineal descendant of Mary Fitzgerald in existence; secondly, that the statement that at the time of the death of Matthew Purcell, there was no other issue or lineal descendant of Giraldus Barry except the issue of James Barry of Ballydona, and

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\* This count (the sixth) however stated that George the Fourth and William the Fourth respectively died seised, which it will be observed was not stated in the fifth count.

E. T. 1848. *Mary* his wife, was inferential, argumentative, and tendered an  
*Common Pleas.* immaterial issue; and thirdly, that the seisin alleged in John and  
 THE QUEEN *Mary Fitzgerald* was improperly laid, inasmuch as it did not show  
 v. the commencement of the estate to John and Mary Fitzgerald and  
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*Ryan*, with whom was *Butt*, for the defendants.

In an action by the heir, he must show his pedigree and *comment hæres*, for it lies in his proper knowledge; but where one is sued as heir the plaintiff need not, for he (the plaintiff) is a stranger, and it would be hard to compel him to set forth another's pedigree: *Denham v. Stephenson* (a). In all cases where a man claims as cousin and heir, he must show how: but not when he claims as brother, or son and heir. *Per* Dodderidge, J., in *Godfrey v. Dixon* (b), it is held to be unnecessary to state how the defendant is heir; for it may not be in the plaintiff's knowledge, as where the defendant is the nephew or cousin of the person who died last seised, it is enough to charge him generally as heir: 2 *Wms. Saund.*, 7 f. But it is an established rule that, in all real actions brought by an heir on the seisin of his ancestor, the demandant must show how he is heir. It is not enough to say he is heir to such a one generally, but he must set forth specially in what manner and how he is heir, and that too with accuracy and correctness, otherwise it will be bad on demurrer, or after judgment for the demandant by default, or on demurrer: *Worley v. Blunt* (c); 2 *Wms. Saund.* 45, e. In *Heard v. Baskerville* (d), the omission to state how cousin and heir (the manner of cousinage) was admitted by the Court to be matter of special demurrer.

By the second count, heirship has not been shown to Mary Barry the wife of John Fitzgerald, although we admit that a cousinage has been shown to her. The count does not aver that James, Bartholomew and John were the only issue or lineal descendants of Mary Barry otherwise Fitzgerald; but the plaintiffs say that, having

(a) 1 Salk. 355.

(b) Godb. 275.

(c) 9 Bing. 642; S. C. 2 Moo. & Sc. 809, *per* Alderson, J.

(d) Hob. 232.

averred that there was no other issue or lineal descendant of Geraldus Barry except the issue of James Barry of Ballydona (now represented by William Edward Fitzgerald), they have excluded the possibility of there being any lineal descendants or issue of Mary Barry otherwise Fitzgerald now in existence. This may be an unanswerable argument in favour of the non-existence at present of any lineal descendant or issue of Mary; but being only a matter of inference, such a mode of pleading cannot be supported upon special demurrer: "*Non enim sufficit simpliciter proponere intentionem suam sic dicendo, peto tantam terram ut jus meum, nisi sic illam fundaverit quod doceat ad ipsum jus pertinere, et per quam viam et per quos gradus jus ad ipsum debeat descendere?*" *Bracton de Legibus*, fol. 372. The same doctrine follows from *Slade v. Dowland* (a), which was upon general demurrer.—[DOHERTY, C. J. The pleading in that case was suicidal.]—The way in which we apply that case is this—it shows that if upon the count here it had appeared that there was a lineal descendant of Mary Barry unaccounted for, it would have been bad upon general demurrer, and that we therefore have, upon special demurrer, a right to say that there may, notwithstanding any thing here directly averred, have been such a lineal descendant.

Secondly, it was argued that the same count was defective, as the seisin alleged in John Fitzgerald and Mary Barry otherwise Fitzgerald his wife did not show the commencement of the estate to John and Mary and the heirs of Mary. That this was not a general estate of fee-simple, but a qualified particular estate; inasmuch as if John had survived Mary his wife, he would have been merely tenant by courtesy; and that a general allegation of seisin in them would not suffice, but the commencement of a particular estate must be shown: *Co. Lit.* 303, b. This second objection was not much pressed, it having been completely discountenanced by the Court.

*Leslie*, for the plaintiff.

We admit the necessity of averring that William Edward Fitz-

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(a) 2 Bos. & Pull. 570; S. C. 5 East, 271.

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gerald is heir, and of showing how it is that he is cousin of John and Mary Fitzgerald; and both of these requisites we have complied with; but we deny that we are bound to negative the existence of every possible lineal descendant of John and Mary Fitzgerald. How could we prove such a negative? If any other lineal descendant existed, it lay upon the defendants to plead that fact. As the record stands at present, the Court will intend for us all necessary circumstances; it is not necessary for us to negative a fact which, if true, ought to be alleged on the other side: 1 *Chitty on Pleading*, p. 571, 5th ed. So, if a man pleads that he is heir of A, he need not say either that A is dead, or had no son: *Dalison*, p. 67; 2 *Wms. Saunders*, p. 305, *b*; but, if necessary, the allegation of the failure of all other descendants of Giraldus is a positive averment of the negative fact alleged to be necessary.

*Butt* was called upon by the Court to support his demurrer.

The plaintiff had two propositions to establish:—First, that William Edward Fitzgerald is the lineal descendant of Giraldus Barry; and secondly, that the lineal descendant of Giraldus Barry is the heir of Mary Barry otherwise Fitzgerald. An essential part of the latter proposition is, that Mary Barry had no remaining lineal descendant; and this not having been averred, the fact must be taken most strongly against the pleader: the plaintiff has therefore failed in the deduction of title.

DOHERTY, C. J.

The decision of the Court is, that the demurrer to the second count of the declaration be overruled. We go along with the argument of Mr. *Leslie*, and we think that the count offers a full and sufficient issue; whereas the other mode of pleading contended for would lead to great and unnecessary prolixity. The Crown, claiming in right of a collateral relative of the first purchaser, Mary Fitzgerald, was bound to show step by step his consanguinity and heirship; but to effect this, it was not necessary to aver the extinction of all her lineal descendants or issue. If any such existed, it lay upon the defendants to plead the fact.

TORRENS, J.

I think that an issue sufficient to decide the question of heirship or no heirship has been tendered by the second count. The negative averments, the absence of which is complained of by the defendants, are in fact concentrated in the averment of the heirship of William Edward Fitzgerald.

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BALL, J.

I cannot say that I differ from my Brethren. I think that there was a fair subject for argument in the case; but, upon the whole, I am induced to concur in the rule pronounced.

JACKSON, J., concurred.

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The first plea of the Rev. William Wilson to the first count was:—"And the said defendant William Wilson, by, &c., comes and defends, &c., and as to the said church in the said first count of the declaration above mentioned, saith that he is parson thereof canonically imparsonate in the same upon the presentation of the said Edward Wilson, and he pleads that her said Majesty (*actio non*). Because he saith that the ancestors of the said Edward, whose estate he hath, have been, and that said Edward himself hath been, and still is, seised of the advowson in the said church in the first count of the said declaration mentioned, as in gross of itself as of fee; and that the said Edward being so seised thereof as aforesaid, the said church became vacant by the death of the said Rev. Matthew Purcell, clerk, the then last incumbent thereof; and being so vacant, he the said Edward, to the church being so vacant, presented the aforesaid defendant William, his clerk, to the Bishop of Cork, Cloyne and Ross, ordinary of the same place, as it was lawful for him to do; and upon the said presentation of the said Edward, said defendant William, before the issuing of the said writ of her said Majesty, was, by the said Lord Bishop of Cork, instituted, admitted and inducted therein, and from thence hitherto hath been and still is parson of the said church, *without*

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*May 30.*  
*June 3, 6, 14.*

T. T. 1848. *“this, that the said Giraldus Barry was seised of the advowson of the*  
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 THE QUEEN *“said church, as of fee and of right, to him and his heirs, in manner*  
*v.* *“and form as the said Attorney-General for and on behalf of her*  
 BISHOP OF *“said Majesty hath in the said first count of the said declaration in*  
 CORK. *“that behalf above alleged.”—Verification and prayer of judgment.*

The Rev. William Wilson pleaded to the first count twenty-three other pleas, exactly similar in inducement to the foregoing plea, and concluding each with a special traverse of some distinct allegation in the first count.

His nineteenth plea to the third count, his sixteenth plea to the fourth count, his fourth, fifth and sixth pleas to the fifth count, and his second, third and fourth pleas to the sixth count, contained an inducement similar to that of the first plea to the first count, and specially traversed some allegation in the respective counts to which they were pleaded.

The defendant Edward Wilson pleaded to the first, third, fourth, fifth and sixth counts several pleas, containing inducements similar to that in the first plea of William Wilson, and each traversing some allegation in those counts respectively.

A count in *quare impedit* alleged a presentation to the vicarage of D., and afterwards a presentation of the same clerk by the same patron to the rectory of D., and stated a subsequent consolidation of the vicarage and rectory, and from that point proceeded for the union. *Held*, that the defendants may by one plea specially traverse the presentation to the vicarage, and by another

The second plea of the Rev. William Wilson to the first count was, as already stated, identical in inducement with his first plea to that count, but concluded with the following special traverse :—  
*“Without this, that the admission and institution of the said Hugh Burgh into the rectory of the said church in the said first count of the said declaration mentioned was upon the presentation of the said Giraldus Barry in manner and form,” &c.* The third plea of the Rev. William Wilson to the first count had, as already stated, a like inducement to the first plea to that count, but concluded with this special traverse :—*“Without this, that the admission and institution of the said Hugh Burgh into the vicarage of the said church in the said first count of the said declaration mentioned was upon the presentation of the said Giraldus Barry in manner and form,” &c.* To the second plea the Crown demurred, because the clerk specially traverse the presentation to the rectory.

had thereby pleaded as a defence to both the rectory and the vicarage of the church, that Giraldus Barry did not present to the rectory thereof; and the Crown demurred to the third plea, because it set up as a defence to the rectory the non-presentation to the vicarage.

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*Leslie* and the *Attorney-General* pressed the objection in the terms of the demurrers to those pleas, and argued that inasmuch as the first count went for the union, it was no answer for the pleas to traverse the presentation to a part of it only; for that where a plea professes to answer the whole of a count, and answers a part only, it is bad.

*Ryan and Butt.*

The presentation of Hugh Burgh by Giraldus Barry to the vicarage, and the presentation of the same clerk by the same patron to the rectory, are distinct and separate allegations in the count, and we could not have traversed those presentations collectively, or in any other way than that adopted. It is true that the Crown sues for the union, but if we succeed in destroying its title to a part of that union, we destroy it to the whole. *The King v. Archbishop of Armagh (b)* was mentioned.

JACKSON, J.

The Crown here claims but one thing at present: that, however, it alleges to have consisted at a former period of two distinct things; if its title to one of these be overthrown, it fails as to the whole. What the defendant has here done is to traverse the facts separately which were separately alleged, and, in so doing, he has pursued the only course open to him if he sought to deny the presentation of Hugh Burgh to what now constitutes the union. It is good pleading to break a single link in the chain of title.

The Court was unanimous in saying that this cause of demurrer

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to the second and third pleas to the first count could not be sustained; but withheld its judgment upon those pleas until after the argument of the demurrer, which, upon another ground, was taken to those pleas in common with all the other pleas to the first count.

A declaration in *quare impedit*, in the deduction of title, alleged "that A was the *only* daughter of B." A special traverse "without this, that A was the *only* daughter of B," is not too large, and does not tender an immaterial issue.

The sixteenth plea to the first count commenced with an inducement similar to that in the first plea to that count, and terminated with this special traverse:—"Without this, that the mother of the said Mary Cunningham was the *only* daughter of the said Giraldus Barry, in manner and form as is in the said first count of the said declaration in that behalf alleged," &c.

*Leslie and the Attorney-General.*

The issue tendered by this plea is immaterial, and the traverse is too large. It admits that the mother of Mary Cunningham was a daughter of Giraldus Barry; and there is an averment in one count, that on the occurrence of the vacancy "there was no issue or lineal descendant surviving of the said Giraldus Barry, save and except the issue of the said James Barry of Ballydona, and Mary Cunningham aforesaid, his wife." The averment in the count, that the mother of Mary Cunningham was the *only* daughter, was accordingly superfluous, and the defendant could not plead that there was another daughter of Giraldus Barry, without also showing that there is issue of that daughter in existence. It follows hence, that the issue tendered, viz., that Mary Cunningham was not the *only* daughter, is immaterial.

*Ryan and Butt.*

Admitting even that their count would have been good if it had omitted the word "*only*," yet in that case it would have been a good plea to say that she was not the *only* daughter of Giraldus Barry; and therefore the plaintiffs, having chosen to make the averment in the count that she was the *only* daughter, cannot debar us from saying that she was not so. If we had limited ourselves to

traversing the concluding allegation—namely, that there was no issue surviving of Giraldus except the issue of James Barry and Mary Cunningham, it would have been said that such traverse was immaterial, as denying an averment which if it stood by itself would have been insufficient pleading, and, that by traversing it alone we admitted all the separately alleged facts, of which it was but the summary; perhaps we should be more correct in saying that it was only a statement of the effect of those distinct facts.

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If a traverse of the general averment were immaterial, is it not open to the defendant to traverse this particular averment? Suppose a plaintiff to state that he is seised in fee, although an estate for life or in tail would support his case equally well, yet it certainly would be open to the defendant to traverse the seisin in fee.

JACKSON, J.

The argument for the Crown would require us to strike our pens through the word “only” in the first count. I do not see how we should be justified in doing so.

*Attorney-General.*

If the negative coming from the other side were material, I admit that the word “only” could not be struck out; but we deny the materiality of the negative, and say that the word is surplusage.

*Butt.*

Would it not be an argumentative plea, if we were to say that there was another daughter?

BALL, J.

From what has already fallen from the Court, it will be perceived that we think that this ground of demurrer may be abandoned; it will be as well that Counsel for the Crown should now proceed to argue the remaining branches of the case.

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Where a count in *quare impedit* alleged a seisin in fee of an advowson in one Sovereign and a presentation by him, and that he died so seised, whereupon his successor became seised; *Held*, that a plea which did not show any termination of the seisin of the former Sovereign, and which specially traversed the seisin of his successor, was ill, inasmuch as it traversed a conclusion of law.

The fourth, fifth and sixth pleas to the fifth count, and the second, third and fourth pleas to the sixth count, contained an inducement analogous to that in the first plea to the first count; the fourth plea to the fifth, and the second to the sixth counts respectively, concluded with a special traverse of the seisin of George the Fourth, in manner and form as alleged; the fifth plea to the fifth, and the third to the sixth counts respectively, concluded with a similar traverse of the seisin of William the Fourth; and the sixth plea to the fifth, and the fourth plea to the sixth counts respectively, concluded with a similar traverse of the seisin of her present Majesty.

To these six pleas to the fifth and sixth counts, the Crown specially demurred for, amongst other reasons, that admitting a previous seisin *jure Coronæ* in fee in the Crown, they did not in any manner show the same to be terminated, and that they attempted to traverse conclusions of law.

*Leslie*, for brevity sake, argued the demurrer to the three pleas to the fifth count only; the question arising upon the three pleas to the sixth count being the same in principle. The fifth count commenced by averring a seisin in King George the Second, in right of his Crown, and a presentation by him; that seisin and presentation must be taken as admitted by these pleas, which passing over without notice, the descent of the advowson upon and the seisin of George the Third, traverse the seisin of the subsequent Sovereigns, without having shown the previous seisin of George the Second to have terminated. The seisin in George the Second having been accompanied by a presentation was a seisin in deed; the seisin averred by the fifth count as being in George the Fourth, William the Fourth and her present Majesty, were merely seisins in law, following from the fact of their predecessors having died seised; and therefore being mere matter of law, were not traversable: the distinction between a seisin in deed and a seisin in law is well known to the law: *Co. Lit.* p. 29, a. "A tenant of freehold in deed, if he be disseised "of the freehold, may have an assise; but tenant of a freehold in law "before his entrie in deed shall not have an assise." *Lit.* p. 681. If

a man die seised of lands in fee-simple or fee-tail general, and these lands descend to his daughter, and she taketh a husband and die before entry, the husband shall not be tenant by the courtesy, and yet in this case she had a seisin in law; but yet if her husband had entered during her life, he should have been tenant by the courtesy: *Co. Lit.* p. 29, *a.* The King, seised in *jure Coronæ*, need not show how the estate comes to him, if he show that his ancestor was seised in fee, for it shall be intended to have continuance: *Com. Dig. Pleader*, E, 20; and from the language of Holt, C. J., in *Rex v. The Bishop of Chester* (a), hence, and from *The King v. The Bishop of Worcester* (b), it is evident that the traverse of a naked seisin, unaccompanied by presentation, is immaterial. In *Hone v. Woodhouse* (c), which was an action of covenant by the assignee of the reversion against the assignee of the lessee, the declaration stated that John Styles, being seised of certain premises, demised them by indenture to C B, with the usual covenants; that C B, the lessee, entered into the premises, the reversion thereof belonging to John Styles the lessor; that the lessee's interest had vested in the defendant, who entered, &c., the reversion belonging to the said John Styles, who being so seised of the reversion, by will, &c., devised it to John Nokes and his heirs, and died seised, without altering his will, whereupon and whereby John Nokes became seised, &c. The declaration then stated the death of Nokes, so seised, whereupon and whereby the said reversion came to the plaintiff as heir-at-law of Nokes; and that thereby the plaintiff then and there became seised of the said reversion; the declaration then assigned breaches. One plea was, *actio non*, because after making of the said indenture, the reversion did not belong to the said John Styles, *modo et formâ*, &c.; another plea was, *actio non*, because the said John Nokes did not become nor was seised of the reversion, &c.; another plea was, *actio non*, because the plaintiff did not become nor was seised of the said reversion. All these pleas were held ill, for traversing that which was legal inference

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(a) Skin. R. 657.

(b) Vaugh. R. 56.

(c) Sm. & B. 301.

T. T. 1848. from preceding matter.—[TORRENS, J. Your reasoning, upon the  
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 THE QUEEN principle of *Hone v. Woodhouse*, applies still more strongly in  
*v.* *Quare Impedit.*—The case of *The Grocers' Company v. The*  
 BISHOP OF *Archbishop of Canterbury* (a) will probably be cited on the other  
 CORK. side; but Bushe, C. J., in *Hone v. Woodhouse* (b), says:—"As to  
 "the case of *The Grocers' Company v. Archbishop of Canterbury*,  
 "it proves that matter of law, connected with matter of fact, may be  
 "traversed, which is not disputed; but it proves also that matter  
 "which is only consequence of, or result from, other facts, is not  
 "generally traversable." That such a consequence or inference is  
 not traversable, is explicitly laid down in 2 *Wms. Saund.*, p. 23, n. 5.

*Ryan and Butt*, for the pleas.

In *Hone v. Woodhouse*, the traverses were of pure matter of law; but here the traverse is one of mixed law and fact, and as such is supported by the *The Grocers' Company v. The Archbishop of Canterbury*. An averment that the eldest son is the heir of his father would be then a matter of law; but an averment that A B is the heir of C D constitutes a mixed allegation of law and fact. The distinction sought to be raised between a seisin in law and a seisin in deed is illusory, and cannot be maintained. It is said that a seisin in deed comprises within it a presentation also; but it is manifest that a plea, traversing the seisin and the presentation likewise, would be open to a demurrer, for duplicity.

DOHERTY, C. J.

We think that the argument for the Crown has upon this branch of the case been quite unanswerable, and that *Hone v. Woodhouse* is conclusive as to the invalidity of the pleas. It is quite unnecessary for me to recapitulate the reasons and authorities already offered and quoted in the progress of the case. Suffice it to say that, tacitly admitting the seisin *jure Corona* of George the Second, these pleas traverse what is the mere seisin in law of his successors, inasmuch as no presentation by them has been alleged. In the

(a) 2 Black. R. 776; S. C. 3 Wils. 234.

(b) Sm. & B. 315.

absence of all matter of fact tending to displace that seisin, we must understand it to have been the necessary legal consequence of the seisin *jure Coronæ* of George the Second. It follows that the demurrer to these pleas must be allowed.

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The last plea of the defendant Edward Wilson (the alleged patron) to the fifth and sixth counts of the declaration was as follows (*actio non*):—"Because he saith that though true it is that "his late Majesty King George the Second did present to the said "church, in the said fifth count mentioned, and though true it is that "his late Majesty King George the Third did present to the said "church, in the said sixth count mentioned, in manner and form as "in the said declaration mentioned, yet the said defendant saith that "long before the said King George the Second or the said King "George the Third had any thing in the said advowsons, or either "of them, one Patrick James Barry claimed, possessed and enjoyed "the said advowsons of the said churchs, in the said counts respectively mentioned, to wit, on the 1st day of January 1720, to wit, "at, &c.; and this defendant further saith, that before, and at the "time of the said presentation by King George the Second, in said "count mentioned, the said Patrick James Barry was a papist and "person professing the Roman Catholic religion, to wit, at, &c.; and "the defendant further saith, that the said Patrick James Barry "afterwards, to wit, on the 1st day of February 1760, died, to wit, "at, &c., and that after his death, no heir of the said Patrick James "Barry conformed and took the oath and subscribed the declaration "required by the statute in that case made and provided, to entitle "the heirs of papists to present to advowsons, before the time, hereinafter mentioned, of the conformity of James Fitzgerald, or before "the time of the presentation to the said church, in the said sixth "count mentioned, by our late Sovereign Lord King George the "Third, in said sixth count alleged; and the said defendant saith, "that afterwards and after the time of the said presentation by our "said Lord King George the Third, one James Fitzgerald was the "grandson and heir of the said Patrick James Barry, to wit, on the

In *quare impedit*, the rule against counterpleading the title of the plaintiff, where the defendant does not aver any title in himself, is not limited to the pleas of the clerk and ordinary, but applies to the pleas of any defendant who does not allege title in himself; and this is so, although in fact his clerk be in possession.

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"1st day of May 1800, to wit, at, &c.; and the said James Fitzgerald  
 "being such heir as aforesaid, afterwards, to wit, on the day and  
 "year last aforesaid, took the oaths, subscribed to the declaration,  
 "and conformed to the Church of Ireland, as by law established,  
 "in manner and form as prescribed by a certain Act of Parliament  
 "passed in the Parliament of the kingdom of Ireland, in the  
 "second year of our late Sovereign Lady Queen Anne, entitled  
 "'An Act to prevent the further growth of popery in Ireland.'  
 "And this defendant further saith, that therefore all the right,  
 "title and interest of our late Sovereign Lord King George the  
 "Third in the said advowson and presentation to the said churches,  
 "or either of them, in the said counts respectively mentioned,  
 "ceased and determined." Verification.

The demurrer to the foregoing plea assigned as cause, "That  
 "no sufficient or certain title is shown thereby, either in the said  
 "Patrick James Barry or the said James Fitzgerald or the said  
 "Edward Wilson, and that such titles are not shown with suffi-  
 "cient certainty; and that the nature of the alleged interest of  
 "said Patrick James Barry is not shown, and that no title is  
 "sufficiently traced to them or either of them, and that no cer-  
 "tain or material issue could be taken on said plea; and that the  
 "seisin of their Majesties in said counts respectively mentioned  
 "is not shown to be other than as in said counts stated; and  
 "that no title is shown in the said Edward Wilson, and no right  
 "to counterplead her Majesty, and no justification of the disturb-  
 "ance thereby alleged, and no presentation or seisin in any other  
 "than the Crown; and that said plea is in other respects double,  
 "uncertain, informal and insufficient."

*Leslie.*

This plea cannot be supported; the incumbent, *or any other that claimeth nothing in the patronage*, cannot counterplead the title of the plaintiff: *Colt v. Bishop of Lichfield* (a); *Elvis v. Archbishop of York* (b); *Meath v. Winchester*, per Tindal C. J. (c). For this,

(a) Hob. 162.

(b) Hob. 316.

(c) 4 Cl. & F. 556; S. C. 10 Bligh, 480.

there is one reason common to other actions, wherein title is contained to the land in question specially, which is, that the tenant shall never be received to counterplead, but he must convey himself, by his plea a title to the land, and so avoid the plaintiff's title alleged by traverse or confessing and avoiding. But in *quare impedit* there is a further reason, for both plaintiff and defendant are actors one against another, and therefore the defendant shall have a writ to the Bishop as well as the plaintiff, which they cannot have without a title appearing to the Court. And therefore if the defendant never appear, yet the plaintiff must make a title for form's sake, and so must the defendant if the plaintiff be nonsuit (a).

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*Leslie* was proceeding to observe that the title of the Crown was not shown by the plea to be derived from Patrick James Barry, when the Court expressed a wish to hear the other side on the point already argued for the Crown.

*Ryan.*

The rule against counterpleading the title of the plaintiff is confined to the case of the clerk or ordinary, as is shown by the language of Tindal, C. J., which has been read to the Court; there is not any decision which extends that rule to any other person. It would be contrary to the analogy of pleading in other actions, if a party in possession were not permitted, without alleging title in himself, to impugn the title of one who seeks to deprive him of his possession.

DOHERTY, C. J.

The first passage in *Hobart*, p. 162, read by the Counsel for the Crown, shows that the rule against counterpleading the title of the plaintiff is by no means restricted in application to the clerk and ordinary, but extends to the case of any defendant "that claimeth nothing in the patronage;" and the reasons upon which this doctrine has been rested, with respect to the clerk and ordinary, have, at the least, equal force where the party pleading is a stranger to

(a) 4 *Hobart*, 162, 163.

T. T. 1848. the title, in which light Edward Wilson must here be regarded, for  
*Common Pleas.* the plea in no way connects him with the title. Accordingly we  
 THE QUEEN are unanimous in overruling this plea.  
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In *quare impedit*, pleas by way of special traverse by either the alleged patron or his clerk, albeit that the latter has been admitted, instituted and inducted, must *pro forma* as inducement show a title in the alleged patron, inconsistent with that of the plaintiff. A general and vague averment of seisin in the alleged patron and his ancestors will not be sufficient. The principal object of this rule is the restriction of the defendants to the production of such evidence only under those pleas as is consistent with their title, as specially set forth in the inducements.

To all the pleas, both of William Wilson and Edward Wilson to the first count, certain common grounds of demurrer were assigned, which in substance were, that none of those pleas showed any sufficient or certain title, or rightful seisin in Edward Wilson, or any rightful presentation by him or his ancestors, and that the inducements\* thereto respectively were not inconsistent with the title of her Majesty, or with the facts purported to be traversed by those pleas, and that a seisin in fee was alleged in Edward Wilson without tracing the same from the previous seisin in fee admitted in the pleadings, or a seisin prior thereto; that all those pleas were double, the inducements to the traverses being in the nature of confession and avoidance, as admitting the presentation by Giraldus Barry, and that they were uncertain as to time and place of the seisin thereby alleged, and did not name the ancestors whose seisin was stated; that they attempted to put into issue conclusions of law, and traversed seisins of parties whose presentation they admitted; and for the foregoing reasons were bad as special traverses, and if intended as simple traverses should have concluded to the country, and if taken together were double, in putting forward several defences by leave obtained *ex parte*, and not authorised by the statute in a suit by the Crown.

The same grounds of objection were urged to those pleas to the other counts, which contained inducements similar to those of the pleas to the first count.

### *Leslie.*

The inducement is bad, as not amounting in itself to a sufficient answer in substance to the count, which it should be, even though not issuable: *Stephen*, 1st ed., p. 208; 5 *Bac. Ab.*, 5th ed., *Traverse*, p. 380; *Cro. Car.*, p. 336. It does not state such circumstances

\* For the inducement, *vide supra*, p. 127.

as tend to show the count to be untrue. There is no title alleged anterior to that of Giraldus Barry; and a seisin alleged by a plea, but not averred to be prior to that in the declaration, will be presumed by the Court to have been either subsequent to it, or a usurpation. Parker, C. B., says (a):—"And, according to the rule "of pleading, even between subject and subject, there ought to be a "proper inducement to every traverse, to show the matter contained "in the traverse to be material; for the inducement to the traverse "is not generally traversable, yet it ought to be such as, if true, will "defeat the title of the other party, otherwise the traverse amounts "to a negative pregnant." And again, he says:—"And improper "inducements are ridiculed in Yelverton; as if you might as well "say—'Robin Hood in Barnewell stood.'" And again:—"And this "is still stronger in the case of the Crown; for whosoever pleads "off the King's hands ought to show a title prior to that found by "the inquisition, and the King is not confined to take issue upon the "traverse offered by the defendant, but has his election to traverse "the inducement or title set out in him." In *Perrot's case*, which was an information by the Attorney-General against the defendants for an intrusion, it is admitted (b) that a defendant must make title in himself in order to enable him to traverse the Queen's title; and if he fails to do so, he will be adjudged an intruder. And *quare impedit* does not differ in this respect from other actions; for in it, when the defendant traverses any part of the plaintiff's count or declaration, it ought to be such part as is inconsistent with the defendant's title, and being found against the plaintiff, absolutely destroys his title; if it do not so, however inconsistent it be with the defendant's title, the traverse is not well taken: *Tufton v. Temple* (c). That case will probably be cited, to show that if a party be in possession by the presentation, institution and induction of his clerk, he is not an actor; and this we admit: but we say that he is bound to make title *pro formâ*, and in that very case, the defendant (the patron) did make such title. Bushe, C. J., in his judgment in *Bishop of Meath v. Winchester* (d), in alluding to the

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(a) Park. R. 131, 132.

(b) Moo. R. 385.

(c) Vaugh. 8.

(d) Alc. & Nap. 552, 553.

T. T. 1848. Bishop's twelfth plea to the fifth count, says:—"If we were to hold  
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 "that this traverse puts in issue every fact in the declaration,  
 "material and traversable, we should rule that special traverses  
 "are altogether unnecessary; and not only that the plaintiff must  
 "set out a title, and go to trial prepared to prove it, but that the  
 "defendants, by a plea in the nature of a plea of the general issue,  
 "may not only throw upon the plaintiff the burthen of proving his  
 "title, but must also take him by surprise, and go into proof of his  
 "own title without having shown in pleading what it was. Now,  
 "that is contrary to the rules of pleading in *quare impedit*, which  
 "require, if the plaintiff shows a good title in himself or his patron,  
 "that the defendant, if he relies on a better title, must set it forth in  
 "his plea. A defendant in *quare impedit*, who defends as patron,  
 "can rely upon title in himself only, and cannot set up title in a  
 "stranger; and on the same principle an incumbent, who pleads a  
 "presentation by a certain patron, cannot set up title in another  
 "patron, under whose presentation he does not claim." The latter  
 position is also to be found explicitly laid down in *Elvis v. Arch-*  
*bishop of York* (a) as law, even though the clerk be presented,  
 admitted and inducted.—[Counsel here cited the authorities relied  
 upon in his argument upon the last plea of Edward Wilson to the  
 fifth and sixth counts.]—Although the inducement be a good answer  
 to parts of the declaration, yet if it be not so to the part traversed  
 it cannot be sustained: *Com. Dig. tit. Pleader*, G, 20, and the case  
 cited in *Tufton v. Temple* (b) from 27 *Hen. 8, fol. 29*.

The inducement cannot be said to conflict with our title as set  
 forth in the count; the defendants have alleged a seisin in Edward  
 Wilson and his ancestors, but for aught that appears to the contrary,  
 that seisin may have been derived from Giraldus Barry or some of  
 our ancestors; and such a state of facts being inferrible from the  
 plea, it should have shown how that seisin passed to Edward Wilson  
 and his ancestors, it being necessary in such a case to show the  
 derivation of the fee: *Steph.* 1st ed., p. 328.

These pleas are bad, for duplicity; they have set up in the induce-

(a) Hob. 319, 320, 321.

(b) Vaugh. 12.

ment the seisin of Edward Wilson in 1845, and have each traversed a step in our title. If a man pleads a perfect bar and pleads with a traverse in the same plea, that makes the plea double: *Mallory, Quare Impedit*, p. 238.

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*Ryan*, for the defendants.

The mode of pleading here complained of, although admittedly differing from the usual course of pleading in other actions, nevertheless accords with that permitted in *quare impedit* in this Court; and although anomalous, yet being sanctioned by precedent, it will be maintained: 1 *Wms. Saund.* 347 *d*, note 6. The reason of this practice is obvious, it not being allowable to put a plaintiff on proof of the various steps of his title by means of the common traverse; but special traverses being necessary for that purpose, the Court, in order to the avoidance of prolixity, has suffered defendants to resort to a short inducement such as that used in the present case, because they regard the inducement as merely formal, it not being traversable. What benefit could have accrued to the plaintiffs if we had loaded the records of this Court by setting forth *pro formâ* any imaginary title anterior to that of Giraldus Barry? For such a title, it is conceded, would have sufficed, as it could not have been traversed by the plaintiff. If a defendant has presented his clerk, and he be admitted, instituted and inducted before the *quare impedit* brought, the defendant then hath no cause to have a writ to the Bishop, and consequently the defendant is no actor, but merely a defendant, and the possession of his clerk is a title sufficient, if the plaintiff doth not show a better: *Brown's Ecclesiastical Law*, p. 108. That author then proceeds to say that it will be sufficient for such a defendant to allege a title *pro formâ*, but he does not say that it is indispensably necessary for the defendant to do so; and all his previous reasoning leads to the conclusion that the allegation of such a title is superfluous and useless. All that we seek to do, and all that we can effect by our pleas, is to put the Crown on proof of its title. In many pleas in the case of *The Bishop of Meath v. The Marquis of Winchester* there was an inducement substantially similar to that demurred to here, with the exception that the word "predecessors" was used

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instead of "ancestors." Tindal, C. J., (a) commenting at considerable length upon the twelfth plea\* to the fifth count, which plea contained such an inducement, observes, that the traverse there taken, if demurred to, could not have been supported; he does not, however, utter one single word of objection to the inducement, nor was there any demurrer taken which pointed at that inducement as defective; thus clearly showing the opinion of the experienced pleaders in that case to be, that the inducement was in accordance with the practice of the Court. A demurrer was there taken and allowed, to the eleventh plea of the Bishop, to which the inducement was the same as in his first and twelfth pleas, but the objection made was to the traverse, on account of its duplicity, and not to the inducement. In *Cooke and others v. The Bishop of Elphin, and the Reverend Thomas Lloyd, clerk*,† a like inducement passed without objection.

(a) 4 Cl. & F. 552; S. C. 10 Bligh, 475.

\* That plea, as read in Court by *Ryan* from the case printed for the House of Lords, was as follows:—"And for further plea in this behalf as to said church in said fifth count of said declaration mentioned, the said Bishop, by like leave of the Court, saith (*actio non*), because he saith that his predecessors (Bishops of Meath) were, and he the said Bishop was and is seised, in the manner in said first plea to said fifth count mentioned, of the advowson of the said church, in the said fifth count mentioned; and being so seised, collated the same, being vacant, to the said Rev. James Alexander, his clerk, in the manner and at the time in said first plea to said fifth count mentioned, as he might lawfully do; without this, that the said plaintiff is possessed of the said advowson of said church of Killucan, otherwise Rathweir, in manner and form as the said plaintiff hath in said fifth count in said declaration alleged."—Verification and prayer of judgment. The eighth plea of the clerk was similar to the foregoing plea. The first plea of the Bishop to the same count, and referred to by him in his fifth plea, was (*actio non*): "Because he saith that his predecessors (Bishops of Meath) have been, and that he the said Bishop was and yet is seised of the said advowson, in the said fifth count mentioned, as in gross by itself, as of fee and right, in right of his said Bishoprick, and being so seised thereof as aforesaid, the said church became vacant by the natural death of said Rev. Henry Wynne, the then last incumbent thereof; and being so vacant, he the said Bishop being so seised as aforesaid, did, to wit, on, &c., at, &c., collate the said vacant church to the said Rev. James Alexander his clerk, and then and there put him into the actual and corporal possession of the same church, as he might lawfully do; without this, that the said advowson of the said church of Killucan, otherwise Rathweir, did belong to the said manor of Killucan, otherwise Rathweir, in manner and form as said plaintiff hath in said fifth count of his said declaration above alleged." Verification and prayer of judgment. The first plea of the clerk to the same count was similar to the foregoing plea.

† In 1830 a writ of error from the judgment of the Court of Exchequer Chamber

Although our inducement introduces new matter, it does so merely *pro formâ*. We could not under it give any evidence of title in ourselves, as plainly appears from the judgment of Tindal, C. J., in *Meath v. Winchester*.

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*Butt*, on the same side.

The rule in ejectment that the plaintiff must recover upon the strength of his own title alone is here applicable; to that effect is the language of Lord Loughborough in *Thrale v. The Bishop of London* (a). It is sufficient for our pleas to show the mere *jus possessionis* to rest in us. The apparent scarcity of precedents in justification of this mode of pleading is easily accounted for, by the fact that it is not often, as in the present instance, necessary for the defendant to contravene the whole of the plaintiff's title, because his title and that of the defendant generally to a certain degree coincide; to that extent it is for the interest of the latter to admit the title of the former, and then to avoid the rest.

But these pleas approach more nearly in their nature to common traverses than special, and may be treated as common traverses.

(a) 1 H. Bl. 409.

in Ireland, in the above case, was sued out; and from the case as printed for the House of Lords, the Bishop's first plea was read by *Ryan*. It was (*actio non*), "Because he saith that the said church of the said vicarage of Killglass, in the said first count of the said declaration mentioned, is within the diocese of Elphin, and he the said John Lord Bishop of Elphin as aforesaid now is, and his predecessors, Bishops of Elphin as aforesaid, were each and every of them respectively seised of the advowson of the said vicarage of the said church of Killglass, in the said first count mentioned, as of an advowson in gross by itself, as of fee and right, in right of the said Bishoprick of Elphin aforesaid." It then stated that the Bishop collated the church to the Rev. Thomas Lloyd, "as it was and is lawful and right for him so to do, as and for the reasons aforesaid;" and that Lloyd was put into possession by admission, collation and induction, and that the church thereby became and then was full; and this plea concluded by specially traversing that it belonged to the plaintiffs to present a fit person to the church. The first plea of the clerk was similar to that of the Bishop. The Bishop put forward his title still more succinctly in other pleas by simply averring "that he the said John Bishop of Elphin was seised of the advowson of the vicarage and church aforesaid as in gross by itself, as of fee and right, in right of his Bishoprick aforesaid, and being so seised," collated, &c. The plaintiffs went to the country upon all these pleas and the objections. The matter of appeal arose upon the trial, and not upon the validity of the pleadings.

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It is not to be assumed that the words "*absque hoc*" necessarily constitute a special traverse; those words formerly occurred in the common traverse. To enable the clerk to take any traverse, he was bound to show possession, and of whose presentation he was in, and the patron was bound to show possession by his clerk; the averment of seisin in the ancestors may be regarded as surplusage, and thus the objection to the form of these pleas as ordinary special traverses be wholly got rid of.—[BALL, J. The difficulty you complain of, as to being tied to the matter of inducement, does not exist, because it is not open to the plaintiff to traverse your inducement, if your traverse be well taken.]—Authorities have been cited on the other side, which show that the Crown may under any circumstances traverse the inducement.—[DOHERTY, C. J. It is impossible for us to regard these pleas in any other light than as special traverses; we all felt that as such their validity was asserted by Mr. Ryan.]—At all events, even though viewed as special traverses, they comply with the requisites essential for such pleas, as laid down in the passage cited from *Tufts v. Temple* (a); and it is not there alleged that parties in possession, and therefore not actors, *must* set out a title *pro formâ*.

The *Attorney-General* in reply.

The current of precedents alleged to exist in favour of this mode of pleading has dwindled down to two cases of modern occurrence, in the House of Lords, in which similarly bad pleading passed *sub silentio*. The antiquity of this practice falls very short of that of the anomalous form of pleading which has been cited from 1 *Wms. Saund.* p. 347, d, n. 6; where the Courts are said to have allowed the form, because it had "prevailed in avowries ever since the time of Henry the Sixth at least." A passage in *Digby v. Fitzherbert* (b) is decisive as to the necessity of the defendants, even though in possession, showing by their pleading a title in Edward Wilson. It is this:—"And note, that there are general issues that need no "inducement, as not guilty, *nihil debet, ne disturba pas*, which is the "ordinary plea in these cases; but if a man will leave the general

(a) Vaugh. 8.

(b) Hob. 103.

"issue and controvert the title, he must enable himself by some title  
 "of his own to do it; but yet that is not the principal part of his  
 "plea, but a formal inducement only; and therefore there is no sense  
 "if you will quarrel my possession, and I avoid the title effectually  
 "(and for my sake must and do induce that with a title of my  
 "own), that you shall fly upon my title and forsake your own; for  
 "you must recover by your own strength and not by my weakness:  
 "so I say regularly that whensoever a traverse is taken, apt and  
 "material to the plaintiff's title, the plaintiff is bound to it, and  
 "cannot for the same thing leave it, and force the defendant to  
 "accept another traverse tendered by him; and there is no rule in  
 "the law against this rule as I lay it." The effect of the decision  
 in *The Bishop of Meath v. The Marquis of Winchester*, as to the  
 admission of the fine there offered in evidence, has been misappre-  
 hended on the other side; it does not show that it would not be open  
 to the defendants here to go into evidence of their own title under  
 these pleas: it merely decided that the fine which showed the title to  
 be out of the plaintiff, and in third persons (from whom neither of  
 the defendants there, viz., the Bishop and his clerk, derived) was not  
 admissible in evidence under any of the issues joined in the record.  
 The effect of giving that fine in evidence would have been to cut  
 down the title both of the clerk and his patron, which the law does  
 not allow. It may be collected from the judgment of Tindal, C. J.,  
 that it would have been open to the Bishop and his clerk to have  
 gone into evidence of title in the Bishop, under his twelfth and the  
 clerk's eighth pleas, the plaintiff having thought proper to reply  
 to them, and not to demur; but those pleas, not having shown  
 what that title was, could not have been supported on demurrer.  
 The effect of the defendants here being obliged to make such an  
 inducement as we contend for, will limit them in their positive  
 evidence, given in support of their traverses under the *absque hoc*,  
 to evidence consistent with their title as alleged in the inducement.

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DOHERTY, C. J.

This case has been very ably argued at the Bar upon both sides.  
 We have, however, without difficulty arrived at the conclusion that

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the demurrer extending to all the pleas of the defendants to the first count, and to several of the pleas to the other counts, must be allowed, and upon this distinct ground, namely, the failure on their part to show, by way of inducement, any title in Edward Wilson and his ancestors inconsistent with the title of the plaintiff. The authorities have been so fully discussed in the progress of the argument, as to render it superfluous for me again to travel through them. Suffice it to say, that we conceive it to be the result of those authorities to show, that in order to enable the defendants to traverse the title of the plaintiff, they are bound, even though in possession, to put forward *pro formâ* some title in the patron inconsistent with that laid in the declaration. It seems to have been the uniform course of practice in England to set out such a title; but it has been said that a different and more convenient system of pleading had been adopted in this country. Two cases, and two cases only, have been pointed out in which such pleas appear. It is true that those cases went before the tribunal of final resort, and that it does not appear that any objection upon the grounds now urged against their validity was taken either there or in the Courts below. But that circumstance alone cannot lead us to presume that the House of Lords meant to sanction a mode of pleading which, it is conceded, is anomalous, or that they went beyond the questions which were raised on the writs of error before them. Nor should we be justified in saying that two cases, in which the point was never raised by demurrer or otherwise, constitute such a course of practice as to upset the old and well known rules of pleading. On the question of duplicity raised upon this branch of the case, I refrain from giving any opinion.

TORRENS, J.

I fully assent to the judgment pronounced by my LORD CHIEF JUSTICE, for the reasons which he has assigned. I think too, that the explanation given by the *Attorney-General* of the judgment of Tindal, C. J., on the point arising in *The Bishop of Meath v. Winchester*, as to the admission of the fine in evidence, is quite satisfactory. It is absolutely necessary that the defendants, both patron

and clerk, should be compelled to plead any title which they propose to show in the patron ; whereas if the argument for the defendants were allowed to prevail, it would be open to them to prove a title in themselves which they had never alleged ; and the decision in *Meath v. Winchester* only goes to show that under the pleas in that case they could not, in contravention of the plaintiff's title, show the existence of title in a stranger.

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BALL, J., and JACKSON, J., concurred.

Demurrer allowed.

*Ryan* forthwith moved for leave to amend.

DOHERTY, C. J.

You must give notice of your motion, and at the same time furnish the plaintiff with a list of the proposed amendments.

the purpose, and must supply the plaintiff with a list of the proposed amendments.

Where pleas in *quare impedit* have upon demurrer been overruled, the defendant, if he seek to amend, must give notice of a motion for

June 14.

On this day, *Ryan* moved for leave to amend the inducement to those pleas to which the last-mentioned demurrer had been allowed ; and said that the order for leave to amend should be made without directing the payment of costs by the defendants, as it was the prerogative of the Crown not to pay them to a subject, and beneath its dignity to receive them ; the only exceptions to this rule being those made by the Legislature in certain special cases : *Chitty on Prerogative*, p. 310.

*Leslie* insisted that the rule as to the non-payment of costs to the Crown did not apply to motions, upon which parties may be compelled, under certain circumstances, to pay costs : 2 *Tidd Prac.* 9th ed, p. 1082 ; *The King v. Hassell*(a). The Crown, too, when

The rule, that the Crown neither pays or receives costs, does not apply to cases in which either on its part or on that of the opposite party a favour is sought from the Court ; *ex gr.* on a motion by the defendant in a suit by the Crown for leave to amend some of many pleas, to all of which a demurrer had been allowed, the Court permitted him to

do so, only however upon the terms of paying the costs attendant upon the demurrer to all, and the costs of the motion.

(a) M'Cl. R. 105.

T. T. 1848. seeking a favour, is made to pay costs: *The Attorney-General v. Common Pleas. Haig (a); Rex v. Edmonds (b); Tolcher v. Le Witt (c); Attorney-General v. Archibald (d)*. In *Attorney-General v. M'Alister*\* the defendant was required to pay costs to the Crown, when asking a favour of the Court.

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The defendants require an indulgence from the Court in seeking permission to amend; that indulgence the Court is willing to grant, upon the terms of payment of costs to the Crown. The rule relied upon by Mr. *Ryan* does not extend to motions in which either the subject or the Crown seek that which will not be granted *ex debito justitiæ*.

*Ryan*.

We only seek to amend in part; we should be called upon to pay the costs of those pleas only which we propose to amend.

DOHERTY, C. J.

We cannot divide the costs, where you have been defeated upon the demurrer. Our order is, that you shall be at liberty to amend, on payment of the costs of the demurrer and of this motion; the amendment to be made within a fortnight.

(a) 1 Ha. & Jo. 201, 202.

(b) *Ibid*, App. i.

(c) *Ibid*, App. i.

(d) *Ibid*, App. i.

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\* This case was quoted by *Leslie* from a copy of the order made in the Court of Exchequer on the 3rd of May 1847; whence it appeared that *Fitzgibbon* and *O'Hagan*, for the defendant, moved that the verdict had in this cause, on the trial before the Lord Chief Baron, be set aside.

*George Bennett* opposed the motion.

*Per Curiam*.—Set aside the verdict had in this cause, and let a new trial be had, on the terms of the defendant paying the costs of the former trial and the costs of this motion, within a week after taxation; and on the further terms of the defendant hereby consenting, that in case a verdict should pass for the plaintiff on such new trial, with the approbation of the Judge who shall try the case, immediate execution may issue against the defendant; and if the said costs be not paid within a week after the taxation thereof, that this motion do stand refused with costs.

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*Queen's Bench.*

MARY O'BRIEN

v.

JAMES ROCHE and WILLIAM ROCHE.\*

(*Queen's Bench.*)

Jan. 18, 21, 28.

COVENANT for non-payment of rent, by heir-at-law of lessor against assignees of lessee.

The declaration contained three counts. The first count stated that one John Roche being seised in fee of certain lands and premises, on the 5th of November 1821, at, &c., by indenture of bargain and sale then and there made between the said John Roche of the one part, and one Gerard Callaghan, and one Bartholomew Verling of the other part, he the said John Roche, for the considerations therein mentioned, did bargain and sell, amongst others, the said lands and premises next thereafter mentioned to be demised, situate, &c., to the said Gerard and Bartholomew, their executors, &c.; *Habendum*, from the day of the date of the said indenture, for the term of one whole year, &c.; by virtue of which said indenture, and by force of the statute, &c., the said Gerard Callaghan and Bartholomew Verling then and there became and were possessed of the said lands and premises, with the appurtenances, for the said term so to them thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said John Roche, his heirs and assigns; and the said Gerard Callaghan and Bartholomew Verling being so possessed of the said premises for the residue of the said term so to them granted as aforesaid, afterwards, to wit, on the 6th of November 1821, by indenture of release, then and

A by his will devised certain estates in the following words:—

"Whenever it happens that the A estate, by want of male heirs, to wit, of J. J. R., or by any other contingency, reverts back to me, I hereby leave it in as full a manner as I can convey it, to my nephew W. R., to be enjoyed by him and his lawful begotten heirs male for ever."—*Held*, that such words passed only an estate in tail male.

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NOTE.—This and the two following cases having been removed by writ of error into the Court of Exchequer Chamber, are printed out of the usual order.

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there made between John Roche of the first part, James Joseph Roche of the second part, Daniel Callaghan of the third part, Catherine Callaghan of the fourth part, Gerard Callaghan and Bartholomew Verling of the fifth part, and Patrick W. Callaghan and Garrett Standish Barry of the sixth part (*profert*), he the said John Roche, in consideration of a certain marriage then intended to be solemnised between the said James Joseph Roche and Catherine Callaghan, and of the sum of 10s. then and there, &c., released to Gerard Callaghan and Bartholomew Verling and their heirs the said lands and premises, with the appurtenances, to the use of Roche J. and his heirs until the solemnisation of the said marriage, then to the use of the said P. W. Callaghan and G. S. Barry, and their executors, for the term of ninety-nine years, if John Roche and Catherine Callaghan so long jointly live, and subject to this term, to the use of John Roche for life; and from the determination of that estate by forfeiture or otherwise during his life, to the use of Gerard Callaghan and Bartholomew Verling and their heirs, during the life of the said John Roche, and from and immediately after his death, to the use of James Joseph Roche and his assigns for life; and from the determination of that estate to the use of Gerard Callaghan and Bartholomew Verling and their heirs during the life of James Joseph Roche; and from his decease to the use of the first and other sons of James Joseph Roche and Catherine Callaghan in tail male; and in default of such issue, to the use of John Roche, his heirs and assigns for ever.

The count then set out a leasing power to John Roche, and averred the solemnisation of the marriage, and that thereupon and by virtue of the said last mentioned indenture, John Roche then and there became and was seised in his demesne as of freehold for the term of his natural life of and in the said lands, &c., with reversion in fee expectant on the death and failure of issue male of James Joseph Roche and Catherine Callaghan; and that being so seised, on the 2nd and 3rd of September 1824, by lease and release, John Roche, pursuant to the leasing power, demised and released the dwelling-house and demesne lands of Aghada, with the appurtenances, to William Roche, his heirs, &c., for three lives, at a

rent of £150 yearly, payable by equal and half-yearly payments on the 29th day of September and 25th day of March.

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The count then set out a covenant by William Roche for himself, his heirs and assigns, to pay the rent ; and that by virtue of said last mentioned indenture William Roche became seised for three lives of the demised premises ; and John Roche being seised of the reversion in fee, expectant on the death and failure of issue male of James Joseph Roche, on the 5th of January 1826 made his will, duly attested, and thereby devised his reversion to William Roche and the heirs male of his body lawfully issuing. It then averred that on the 10th of March 1829, John Roche died without altering or revoking his will, and that thereupon James Joseph Roche became, under the settlement of 1821, seised for life of the reversion expectant on the determination of the lease ; and that William Roche became under the will seised of the further reversion in fee tail, expectant on the death and failure of the issue of James Joseph Roche, and that the ultimate reversion expectant on the death and failure of issue male of James Joseph and William descended to plaintiff as sole daughter and heir of John Roche, and that she thereby became seised of the said ultimate reversion as of fee. That afterwards, on the 1st day of June 1832, at, &c., William Roche died without issue male ; and on the 1st of March 1847, James Joseph Roche died without issue male, whereupon plaintiff became seised as of fee of the reversion expectant on the lease ; that on the 1st of January 1846, all the estate and title of William Roche, under the lease of the 3rd of September 1824, came to the defendants ; that two of the lives in said lease are still living ; and that on the 25th of March 1847, at, &c., £69. 4s. 8d., equivalent to £75, late currency, one half-year of said rent, became in arrear and unpaid, contrary to the form of the covenant.

The second count was the same as the first, except that it omitted the statement of the will of John Roche.

The third count averred, that John Roche being seised in fee, by lease and release of 2nd and 3rd of September 1824, demised to William Roche, his heirs, &c., the dwelling-house and premises, for three lives, at a rent of £150 : it set out the covenant for payment of

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the rent, and that by virtue of said indenture William Roche became seised for the lives of the *cestui que vies* therein named, the reversion belonging to John Roche and his heirs; that on the 10th of March 1829 John Roche died seised of the reversion, and that it thereupon descended to the plaintiff as sole daughter and heir of John Roche; that all the estate of William Roche under the lease became vested in the defendants; and stating a general performance and protestation, laid the breach as in the first count, and then stated a general breach, and damages to the amount of £300.

To this declaration the defendants pleaded three pleas; first, as to the first count, *actio non*; because John Roche, being seised in his demesne as of fee of and in the reversion of and in the lands, &c., as in said first count mentioned to have been demised by the said indenture of the 3rd day of September 1824, expectant on the death of the said James Joseph Roche without issue male, duly made his will and testament in the words and figures following, to wit, "Whenever it happens that the Aghada estate, by *want of male heirs*, to wit, of the said James Joseph Roche, or by any other contingency reverts back to me, I hereby leave it in as full a manner as I can convey it, to my nephew William Roche to be enjoyed by him and his *lawful begotten heirs male for ever*; and as I have perfected leases to him in trust of the demesne and two adjoining farms of Aghada, subject to a yearly rent according to a valuation made, I leave him my interest, if any I had, in those leases; and in case of his not coming into possession of the estate by the means above mentioned, I leave him £6000 of my £4 per cent. stock, to be held by trustees, the interest of which is to pay the rent of the demesne and two farms above mentioned; to my eldest grandson James J. R. O'Brien I leave £10,000 £4 per cent. stock; to my grand-daughter Jane O'Brien I leave £4000 £4 per cent. stock; to my daughter Mary O'Brien I leave the £4000 £4 per cent. which I settled on her as a marriage portion on her marriage, for her use and that of her younger children; to my niece Ellen Verling I leave £1000 £4 per cent. stock, with £30 a-year profit-rent I have on her brother Bartholomew Verling's stores; to my grandson J. Roche O'Brien I leave also

"my interest in White Point, after his mother's death; I leave  
 "£100 to my sister Ellen Verling; to my sister Julia Enery £100;  
 "to my nephew Doctor Verling and his sister Catherine Ellis £100  
 "each, and I desire the stock on the farm to be sold to pay these  
 "legacies; to my nephew William Roche, and my grand-daughter  
 "Jane O'Brien, I leave my household furniture, plate, &c., and it is  
 "my wish, if the rules of our church allow it, that they should be  
 "married and live in Aghada house; God bless and prosper  
 "them and their offspring. To the parish of Aghada, I leave the  
 "school-house, and £20 a-year for its support, and also the chapel  
 "and priest's house I leave to the parish rent-free for ever, as long  
 "as they shall be used for such specified purposes; the five slate  
 "houses I built in the village I leave to five of the poorest families  
 "rent-free; to David Coughlan I leave the house he now lives in  
 "during his life; to my servant James Tracy I leave the house his  
 "wife now lives in; and to my wife's servant Mary Ahearne, other-  
 "wise Finne, her house rent-free during their lives; and to each of  
 "those three, viz., David Coughlan, James Tracy and Mary Ahearne,  
 "otherwise Finne, I leave £10 a-year during their lives: having  
 "had unbounded confidence in my unhappy nephew James Roche,  
 "I did not take legal means under the settlement I made to secure  
 "those last bequests out of the Aghada estate; I trust and hope and  
 "desire that whosoever is in possession of the estate will confirm  
 "these my wishes and intents. I appoint my trusty friend Henry  
 "Bennett (my present law-agent), William Roche and my daughter  
 "Mary O'Brien, as executors of this my last will."

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The plea then averred that the said John Roche afterwards, to  
 wit, on the 6th day of September A.D. 1828, at, &c., duly made and  
 published a codicil to his said last will and testament, also signed  
 by him the said John Roche, and subscribed in the presence of the  
 said John Roche by three credible witnesses, according to the  
 form of the statute in such case made and provided, and which  
 said codicil was in the words and figures following:—"By my will  
 "dated the 5th day of January 1826, I appointed my friend Henry  
 "Bennett, my nephew William Roche and my daughter Mary  
 "O'Brien, executors to that will; now, by this codicil I annul that

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"appointment, and appoint John Gibson, Barrister-at-law, Bartholomew Hackett of Middleton, distiller, and my nephew William Roche, as my executors to that will, and do hereby empower them to name and appoint two trustees for the purpose of managing the sums I left to my nephew William Roche, my grand-daughter Jane O'Brien and my grandson J. O'Brien, as it is my intent and will that they should only receive the interest, and the principal to remain untouched during their lives, to go to their children; out of William Roche's interest the rent of Aghada which I have leased him is to be paid; and I desire that he and my grand-daughter Jane, who are shortly to be married, will reside there. I leave William Roche all the stock, &c., on the farm, and to him and his wife all my household furniture, plate and china, and make them my residuary legatees; it is my will that my grandson James R. O'Brien shall live with them at Aghada until he is of age, which is to be at the age of twenty-five, and not before; and that trustees are to pay him until that period £100 a-year to complete his education, and another £100 a-year during that period to his mother, and the remainder of the interest of his £10,000 to be paid William Roche to assist him in keeping up Aghada during that period, and I trust by that time he will have a profession by which he will add to his income; I request and desire that nothing shall prevent his following his profession; it is my intention that William Roche and his wife shall step into possession of Aghada house, demesne and farms, which are leased to him, in the same way that I leave it when it shall please God to take me; in case of the death of William Roche before his wife, she is to be paid the interest of her £4000, to be made up £200 a-year as her jointure; and if she dies before him, he is to have the £10,000, provided she has no issue; but if she leaves issue, it is to go to them after William Roche's death as before directed."

The plea then alleged "that afterwards, to wit, on the 10th day of March A. D. 1829, at, &c., the said John Roche died without altering or revoking his said will and codicil, seised as in said first count of said declaration mentioned, of the reversion of and in the said lands and premises, with the appurtenances, demised by the

"said indenture of the said 3rd day of September A. D. 1824, expectant on the death of the said James Joseph Roche without issue male; and that afterwards, to wit, on the 1st day of May A. D. 1832, William Roche duly made and published his last will and testament in writing, and signed by him the said William Roche, and attested and subscribed in the presence of the said William Roche by three credible witnesses, according to the form of the statute in such case made and provided; and thereby, amongst other things, the said William Roche gave and devised all his estate and interest in the said reversion of and in the said demised lands and premises, with the appurtenances, unto the said defendants James Roche and one Hugh Roche."

It then averred "that the said William Roche afterwards, to wit, on the 1st day of June A. D. 1835, at, &c., died without leaving issue male, without altering or revoking his said will, and that afterwards, to wit, on the 3rd day of July A. D. 1845, at, &c., the said Hugh Roche died, leaving the defendant William Roche his heir-at-law; and afterwards, to wit, on the 1st day of March 1847, at, &c., James Joseph Roche died without leaving issue male, whereby the defendants became, and now and still are, seised in their demesne as of fee of the reversion expectant on the determination of the lease of 1824, granted as aforesaid; *absque hoc*, that the said John Roche, in and by his said will and codicil, devised his said reversion of and in the said demised lands and premises, with the appurtenances, unto the said William Roche and the heirs male of his body lawfully issuing, in manner and form as the said plaintiff hath above thereof complained against them." Verification.

The second plea which was pleaded to the second count was the same as the first, varying only in the special traverse, which was as follows:—" *Absque hoc*, that the further reversion of the said demised premises, with the appurtenances, expectant on the death and failure of issue male of the said James Joseph Roche, descended and came to the said plaintiff as sole daughter and heir-at-law of John Roche." Verification.

The third plea was to the third count, and was the same as the two former, concluding with a special traverse, that the further

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H. T. 1848. reversion descended to the plaintiff as only daughter and heir-at-law of John Roche; and a verification. Demurrer to these pleas, *Queen's Bench.*  
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 ROCHE. and joinder in demurrer.

The points relied on were these:—the plaintiff contended that under the will and codicil of John Roche as set out in defendants' pleas, an estate in tail male only, and not in fee, passed to William Roche. The defendants argued that William Roche took either an estate in fee or a fee tail, with a reversion in fee, or with an expectant fee.\*

*Chatterton*, with whom were *R. W. Greene*, and *F. A. Fitzgerald*, for the demurrer.

To give an estate tail, the words usually are, "to a man and the heirs of his body;" the words here are "to him and his lawful begotten heirs male;" in a deed these words might have given the fee; in a will, however, less formal words suffice; for in a will an estate tail may be created by any words denoting an intention to give the devisee an estate of inheritance descendible to his lineal, but not to his collateral, heirs: 2 *Jarm. on Wills*, p. 232, *Co. Lit.* 27, a. "If a man, by his last will, devise lands or tenements "to a man and his heirs male, this, by construction of law, is an estate "tail, the law supplying these words 'of his bodie'": *Lord Ossulton's case* (a). That was a devise by a man seised in fee to his eldest son in tail male, so to second and third sons; remainder to *his own right heirs male for ever*; and the question was, whether his daughters, as heirs general, or his brother as heir male, should take the lands? and it was held there was no devise over.

In *Baker v. Wall* (b) the devise was "to my eldest son Daniel all my farm, &c., to him and his heirs male for ever." Daniel had no son, and an ejectment was brought by his daughter, and the Court held that the devise to Daniel was of an estate tail male, observing that though in a deed it had been a fee, yet in a will, to gratify the intent of the devisor, the law will supply the words

(a) 3 Salk. 336.

(b) 1 Ld. Ray. 185.

\* There were several other causes of demurrer assigned, but these only were relied on.

"of his body:" *Blaxton v. Stone* (a); *Slater v. Slater* (b). The words there were, "I give my copyhold lands to my nephew Isaac Slater; but if the aforesaid Isaac should die without male heir," then over. There was an annuity directed to be paid by Isaac, which was relied on in the argument; but Lord Kenyon held "it is clear from all the cases that Isaac took an estate tail." And Buller, J., in the same case, says, "the words 'heirs male' may admit of three constructions: first, if the King by letters patent grant to a man and his heirs male, the latter words convey no interest; secondly, if one, by deed, grant to A and his heirs male, A takes a fee; because against the grantor the word 'male' is rejected; thirdly, but in the case of a devise, the devisee takes an estate tail, because the Court may supply the words 'of the body,' if wanted to effectuate the intent of the devisor:" *Doe d. Lord Lindsey v. Colyear* (c). Our case is much stronger than any of these, for the words we rely on are, his "lawful begotten heirs male." The same principle is recognised in *Doe d. Tremewen v. Permewan* (d); *Radford v. King* (e); that was a devise to testator's son Benjamin and his heirs male for their lives, charged with an annuity, and it was held to be an estate tail in Benjamin.

It is also settled that a devise to one and his heirs lawfully begotten creates an estate tail general, though every heir must be lawfully begotten: 4 *Com. Dig. Estates by Devise*, 5; "a devise to a man and his heirs male, or to a man and his heirs lawfully begotten, gives an estate tail:" *Church v. Wyat* (f); *Nanfan v. Legh* (g). In that latter case a testator gave, left and bequeathed all that his estate and land in fee-simple, situate in Millington, to his son Joseph, as soon as he should attain the age of twenty-one, and to his heirs lawfully begotten, for ever, subject to an annuity for his wife; and it was held that Joseph took an estate tail. Here the words "lawfully begotten" and "male" both occur. Then what is there

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(a) 3 Mod. 123.

(b) 5 T. R. 335.

(c) 11 East, 548.

(d) 3 Per. & Dav. 303; S. C. 11 A. & E. 431.

(e) 6 Law Rec. N. S. 37.

(f) F. Moore, 637.

(g) 2 Marsh. 107; S. C. 7 Taunt. 85.

H. T. 1848. to enlarge the estate? There is clearly no intention that the estate  
*Queen's Bench.* should descend generally; and if it be held that the fee passed, then  
*O'BRIEN* the words "to be enjoyed by him," &c., must be utterly rejected,  
*v.* whereas if held that an estate tail passed, then effect is given to  
*ROCHE.* the whole will.

It will be argued that the residuary clause aids the construction the defendants put on the will; but the words "residuary legatees" are not suitable words in this construction; they are applicable to pass personalty; and words of this nature will only pass realty when such expression is used in reference to and synonymous with former words carrying real estate: 2 *Pow. on Devises*, p. 181; *Hope v. Taylor* (a); *Hardacre v. Nash* (b). There is here no general expression of intention to dispose of all the testator's property, no such words as "all my estate," "all my property;" nor are there words of reference to other words carrying real estate; nor are there any such to which they could refer. The residuary bequest is coupled with the executorship: *Shaw v. Bull* (c). That was a devise of "all the overplus of my estate to my wife, and appoint her my executrix;" and the former clause was held to be restricted to personalty by the latter, though otherwise it would have carried the realty. In the whole of this codicil there is no devise of land. But a main objection is grounded on the maxim *noscitur a sociis*: *Bebb v. Penoyre* (d); *Woolam v. Kenworthy* (e). There though the words are "household goods, furniture, plate, linen, china, beds and bedding, and all other his estate and effects of what nature or kind soever and wheresoever," yet Lord Eldon held that a real estate did not pass; although "estate" may suffice to pass realty, yet it must be governed by the context: *Wilkinson v. Merryland* (f); *Lamphier v. Despard* (g). All these cases show how far the context restricts the meaning which words would have *per se*, and here there are no words *per se* sufficient to pass realty, and the words associated are all conversant with personalty: *Doe d. Palmer v. Richards* (h);

(a) 1 Bur. 268.

(c) 12 Mod. 593.

(e) 9 Ves. 137.

(g) 2 Dr. &amp; War. 59.

(b) 5 T. R. 716.

(d) 11 East, 160.

(f) Cro. Car. 447.

(h) 3 T. R. 356.

*Wills v. Wills* (a); *Pitman v. Stevens* (b). But as to the words in the will, "as I have perfected leases in trust," &c., that is, in trust for the testator, they show that leasehold interests were alone in contemplation, for otherwise why not give the fee at once? and why, after limiting an estate tail of the entire reversion, should the testator, by general and doubtful words, give a reversion in fee expectant on these leases?

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Sir C. O'Loughlen and Napier, contra.

Our argument is, that first, William Roche took an estate tail with a reversion in fee; or secondly, an immediate estate in fee, subject to be divested by the birth of issue male; or thirdly, that testator made a distinction between the Aghada estate and the two farms, giving an estate tail in one, an estate in fee in the other. If a man devise his estate, that passes the fee: *Chichester v. Oxendon* (c); 2 *Jarm. on Wills*, p. 181; *Chycke's case* (d).—[CRAMPTON, J. Was the devisee in that case heir-at-law?—No. But the case has been recognised in *Abraham v. Twig* (e). It is cited in *Roberts v. Roberts* (f), and in *Blanford v. Blanford* (g), and in *Sergeant's case* (h); and again in *Doe d. Herbert v. Thomas* (i) it is referred to by Littledale, J. Where, in the first part of a devise, the estate in fee is given and the subsequent words would seem to cut it down to an estate tail, the devisee will take an estate tail with a fee expectant: *Turnman v. Cooper* (k). That case is referred to in *Co. Lit.* 21, a. In *Altham's case* (l) it was held that such words would cut it down to an estate tail; but this view is opposed by the *Year Book*, 21 *Hen.* 6, & 45 *Edw.* 3, c. 20; and now *Altham's case* is not law, and *Turnman v. Cooper* has never been overruled: *Thurman v. Cooper* (m); *Herbert v. Thomas*. The words used in the will,

(a) 1 Dr. & War. 439.

(c) 4 Taunt. 176.

(e) Sir F. Moore's Rep. 425.

(g) 1 Roll. Rep. 320.

(i) 3 Ad. & El. 128.

(b) 15 East, 505.

(d) Dyer Rep. 357.

(f) 2 Buls. 127.

(h) 2 Roll. Rep. 425.

(k) Cro. Jac. 476.

(l) 8 Rep. 154.

(m) 2 Roll. Rep. 23; S. C. Popham Rep. 138.

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"to be enjoyed," amount to the same as "to hold," and thus the case comes within *Turnman v. Cooper*; *Pearson v. Otway* (a). The devisee there took an estate tail with a reversion in fee. There is no distinction in a will where the words are subsequent and where they are precedent; and it is not in accordance with the modern decisions, to say that where there are two inconsistent devises, the latter is to operate. In *Mellish v. Mellish* (b) the words relied on were in the former part of the will, and the rule in favour of the heir is not now acted on, and here the intention was to exclude the heir.

We think that the construction may be put on this will, that a present estate in fee was given, subject to be divested by the birth of a son: 6 *Cru. Dig.* p. 258. A devise of lands, subject to the payment of a life annuity, is a devise in fee: *Peppercorn v. Peacock* (c); *Morrrough v. Lord Dufferin* (d); *Sheph. Touch.* pp. 98, 102. Then William Roche took in the two farms an absolute estate in fee; for the word "interest" carries the fee: *Andrew v. South-house* (e); and the words "in trust" should be read "in pursuance of the power I had." As to the residuary bequest, the word "legatee" is applicable to the disposition of real estate.—[CRAMPTON, J. It may be made applicable.]—*Pitman v. Stevens* (f); *Davenport v. Coltman* (g); *Alleyne v. Alleyne* (h); *Doe d. Freestone v. Parratt* (i). If the words here are to carry but an estate tail, the intention of the testator must be disappointed.

*Napier*, on same side, argued that it is apparent on the whole will that the testator intended to dispose of all his estate in Aghada, out and out; that by the first clause in his will he gives the fee in express words to William Roche; that no express estate is given by any subsequent words, and that no constructive estate tail can be given which would defeat the actual and obvious intention apparent on

(a) 2 Wils. 7.

(b) 2 B. & Cress. 520.

(c) 3 M. & Gr. 356.

(d) 2 Jones, 719.

(e) 5 T. R. 292.

(f) 15 East, 505.

(g) 9 Mees. & Wels. 481.

(h) 8 Ir. Eq. Rep. 493; 8. C. 1 Dr. & War. 439.

(i) 5 T. R. 654.

the will itself; that supposing, but not admitting, that an estate tail is to be implied from the second clause in the will, then both clauses can have full effect by giving an estate in tail male, with remainder in fee; and cited, with regard to the expression "estate," *Loveacres v. Blight* (a); *Randall v. Tuchin* (b); *Andrew v. South-house*. As to words sufficient to pass the inheritance: *Moffett and Wife v. Catherwood* (c). As to cutting down precedent words by subsequent ones in a will: *Gallini v. Gallini* (d); *Doe d. Spencer v. Pedley* (e).

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*Greene* replied.

It is not contended that this is an absolute devise in fee-simple, but that there are two estates given, one in remainder after the other, and that it may be considered the devise of a fee-simple, subject to be divested by the birth of a son. *Chyke's case* has been relied on; the only question there was, what estate the son took; it is referred to in *Vin. Abr. Devise*, A. B., and 1 *Pow.* p. 306, a, note 8. The case is not at all applicable; the fallacy of the other side is, the splitting into two clauses what is but one clause, and but one limitation. In *Turnman v. Cooper* there were two distinct, perfect limitations, and besides, the case is not law: *Littleton's Rep.* p. 345; *Doe d. Ellis v. Ellis* (f). In the present case there is but one devise and one devisee; and in the cases cited there were two devises and two devisees. It was clearly the intention of the testator to give his estate to his heirs male: in a deed, the words, "to be enjoyed by him and his lawful heirs male for ever," would give a fee, because every thing must be taken most strongly against the grantor: *Dawes v. Ferrers* (g); *Doe d. Eustace v. Easley* (h). All these cases establish, that a devise to a devisee and his heirs male will carry but an estate tail, though the words "for ever" follow. Then, if this limitation be taken as one limitation, it passes

(a) *Cowp.* 355.

(b) 6 *Taunt.* 410.

(c) *Al. & Nap.* 472.

(d) 4 *N. & Man.* 898; *S. C.* 3 *A. & E.* 341.

(e) 1 *M. & W.* 677.

(f) 9 *East*, 382.

(g) 2 *P. Wms.* 1.

(h) 1 *Cr. M. & R.* 823.

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*Queen's Bench.* is no reason for saying that the testator intended to devise an estate  
 O'BRIEN in fee : *Dutton v. Engram (a)*.  
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*Cur. ad. vult.*

Jan. 28.

CRAMPTON, J.,\* delivered the judgment of the Court.

This is a demurrer taken by the plaintiff to the defendants' pleas. The action is covenant for rent, brought upon a lease dated the 3rd of September 1824, and made by John Roche to William Roche for a term of lives still subsisting. The plaintiff is the heiress-at-law of the lessor John Roche, and in that character claims the rent reserved by the lease. The defendants are the assignees of the lessee William Roche, and by their pleas deny the plaintiff's title to the rent and reversion.

It is unnecessary to state the declaration or the pleas in detail ; for it is admitted on all hands that the case must turn upon the construction of the will and codicil of John Roche the lessor, which are set out in terms in the pleas. It appears from the pleadings that John Roche was seised in fee of an estate in the county Cork, called the Aghada estate, and that by a marriage settlement dated the 6th of November 1821, John Roche settled the estate on himself for his life, with remainder to his nephew James Joseph Roche for his life, with remainder to the first and other sons of James Joseph Roche in tail male. The settlor reserved to himself a leasing power, under which power the lease declared on was executed.

On the 3rd of September 1824, John Roche made a lease of the house and demesne of Aghada to his nephew William Roche, for a term of three lives, at a rent of £150 yearly. This lease appears to have been taken by the lessee in trust for the lessor. John Roche being thus seised of the reversion in fee of the Aghada estate, subject to the lease to William Roche, made his will bearing date the 5th of January 1826. The testator had, at the time of making

(a) Cro. Jac. 427.

\* BLACKBURN, C. J., was presiding at a Special Commission.

his will, one child only, the plaintiff, who was then a married woman. By this will the testator devises his reversion in fee in the following terms—[His Lordship here stated the will.]

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The plaintiff contends that the effect of the will was to give an estate in tail male in remainder to William Roche, and that estate only; the defendants contend that the true effect of the devise was to give to William Roche an estate in tail male with a reversion in fee, or an estate in fee, subject to be divested by a son born to William Roche; and the defendants further insist that this construction is aided by the codicil to this will executed by the testator, and dated the 6th of September 1828, by which codicil William Roche and Jane O'Brien are made the testator's residuary legatees; but when I add that the codicil is entirely conversant about personal property, and that the residuary bequest applies plainly to personal property only, the question must be considered on the will, and the will only. The theory of an estate in fee to William Roche, subject to be divested on the birth of a son, was abandoned as indefensible, and I dismiss it without an observation.

It is clear upon the authorities that, though in a deed a limitation to a man and his heirs male, or to a man and his heirs male lawfully begotten, would give a fee-simple, yet in a will those words are held to create an estate tail: *Co. Lit.* 27, a; *Nanfan v. Legh*: in this case the words were, to B and his heirs lawfully begotten, *for ever*. So that the addition of the words "for ever" to the limitation makes no difference. But the argument of the defendants' Counsel (admitting the rule which I have just stated) is grounded upon a doctrine which is deduced from the case of *Turnman v. Cooper* and *Chycke's case*. The doctrine stated is, that whenever in the premises of a deed (or in the prior part of a will) an estate in fee is given, and by the *habendum* in the deed or the later words of the will an estate tail is given to the same party, that, in order to effectuate both estates, the donee shall take a fee tail with a reversion in fee expectant.

Now, whatever may have been thought upon the subject in the early periods of the law, so far as deeds are concerned, the doctrine relied upon is not now law. If an estate be given in the premises

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of a deed to A and his heirs, *habendum* to him and the heirs of his body, the estate thus given is held to be an estate tail only: *Sheph. Touch.* by *Preston*, p. 104; *Co. Lit.* p. 21. So that in this case, if the gift had been by deed in the terms of the devise, the rule deduced from the case of *Turnman v. Cooper*, supposing that case to have been well decided, the doctrine relied on would be inapplicable for want of words to create an estate tail; but this is the case of a devise, to which the rules applicable to deeds cannot be applied. The case in *Dyer*, *Chycke's case*, is equally inapplicable; that was the case of a devise to A of the fee-simple of a house, and after her decease to her son. The case is differently reported in other Reports, but whichever be the true statement, and whatever be the doctrine deducible from it, it does not touch the case now before the Court; in that case there was an estate to one with remainder to another person, here there is but one estate and one devisee.

The argument of the defendant is founded upon an assumption which appears to me to be quite unwarranted. He divides the clause containing the limitations to William Roche into two parts, and he assumes that by the first part an estate in fee is given, and by the second an estate tail is superadded to the fee. Now, the whole is but one limitation to William Roche, there is but one sentence and one devise to one devisee. It is tantamount to this saying; "I give, as fully as I can give it, my Aghada estate to my nephew William Roche and his lawfully begotten male heirs, to be enjoyed by him and them for ever." This distinction is taken by the Court in the case of *Turnman v. Cooper*, relied on by the defendants. The Judges there held that there was a difference when the limitation is in one and the same sentence.

It was however contended that the will, in parts of it, and generally, manifested an intent on the testator's part to limit a fee to William Roche, and the next clause in the will to that limiting the estate tail is relied upon—[reads it]—but that clause is plainly a devise of a totally different thing from the reversion of the Aghada estate; it is the testator's interest in the freehold lease taken in trust for him by William Roche.

Again, the testator makes a provision in the following terms:—

“Having had unbounded confidence in my unhappy nephew James Roche, I did not take legal means under the settlement I made to secure those last bequests out of the Aghada estate. I trust and hope and desire that whosoever is in possession of the estate will confirm these my wishes and intents.” I admit that where there is a limited interest devised to A, and it is burdened by an annuity or charge, which required a perpetual interest to support, there may arise an inference in favour of a gift of the fee. But here there is no such intention expressed. The charge is made, not on an individual devisee to whom an estate is devised, but on the whole estate, in whosoever hands it may happen to be. Since the argument, my Brother MOORE has referred me to the case of *Davie v. Stevens* (a), a case which appears to me to be a direct authority in favour of the plaintiff. It is therefore clear that the construction of the will contended for by the plaintiff is the true construction. It follows that the demurrer must be allowed.

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Demurrer allowed.

(a) 1 Doug. 321.

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Jan. 13, 17.

A patent of *Jac.* 1 gave to the patentee, his heirs and assigns for ever, "All that the late dissolved monastery, &c., and also a marcett to be holden at the town of Newrie aforesaid, together with all tolls, &c., and also the assize of bread, ale and wine, and also one courte to be holden at the said town of Newrie, and in or within the pre-cincts and liberties, &c., to be holden before the seneschal or seneschals of the patentee, his heirs, &c., together with power in the same Court to hold pleas of all and singular actions and trespasses, &c., not exceeding the value of 100 marks Irish; and also all and singular fines and amerciements, &c., and knights' fees, wards, marriages, escheats, reliefs, heriots, fines, courtes leets and views of frank-pledge, and courtes baron belonging or appertaining, with the fines, amerciements and profits thereof, wayffs, estraies, goods and chattels of felons, and of such as fly for felony, of felons of themselves, outlaws and of condemned persons and such as are put in exigent, &c., saving always the right, title, estate, claim and demand of all our loving subjects, of, in, or to the premises," &c. The patent granted a power to hold a court baron, and to appoint a seneschal, and "some such fit person as he or they shall think fit to be the bailiffe of the said manor," &c., "and that every of the said bailiffes for and during such time as he or they shall be bailiffe or bailiffes as aforesaid, shall and may have returne and execution of all manner of writts, executions, precepts, warrants, summons, attachments and mandates of us, our heirs and successors, &c., so as no sheriff, bailiffe or other minister of us, our heirs, &c., may enter into the said manor, &c., to execute, prosecute or serve any such like writts, precepts, warrants, summons, attachments, &c., which ought to be executed within the aforesaid manor," &c. *Held*, that the right of appointing a coroner did not thereby pass to the patentee.

TRESPASS on the case. The declaration contained five counts, which did not materially differ. The first count stated that, before the making of the deed poll next hereinafter mentioned, to wit, on the 1st day of January A. D. 1839, at Newry, in the county of Armagh, the lordship and manor of Newry, in the counties of Armagh and Down, was, and hitherto had been and now is, an ancient lordship and manor, and then and there was hitherto, hath been and now is the lordship and manor of H. C. J. H. K. and G. P. H. (trustees of Lord Kilmorey), of great extent, to wit, to the extent of one hundred thousand acres, and including therein divers, to wit, two hundred towns and lands; that the said H. C. J. H. K. and G. P. H., in right of their said lordship and manor, were lawfully entitled to appoint a fit and proper person to discharge the duties of the Coroner of and within the said lordship and manor, and no other person whatsoever had lawful right or authority to perform or execute any such duty within the said lordship and manor, or take any fees, &c., unless in their default, or of the person appointed by them, to discharge the said duties; that by deed poll of the 5th of January 1839, the said H. C. J. H. K. and G. P. H. did give and grant to the plaintiff the office of

Coroner of the said manor and lordship of Newry, in the counties of Down and Armagh, and did nominate, ordain, constitute and appoint the said plaintiff Coroner of the said manor and lordship, to have, hold and enjoy the said office of Coroner, and to take and receive all and singular the fees and rights thereto belonging, to him the said plaintiff, for and during the will and pleasure of H. C. J. H. K. and G. P. H.; that plaintiff accepted the said office, and that he still is the Coroner, and has the exclusive right to discharge the duties of the same, and to take and hold inquests within the said lordship and manor, upon the view of bodies of persons lying dead within the same, unless in default of the said H. C. J. H. K. and G. P. H., or of him the plaintiff; whereof the defendant had notice.

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The count then averred the drowning of one Thomas Russell, and that an inquisition ought to have been holden on his body, and that plaintiff was ready and willing to hold the same, and that neither the said H. C. J. H. K. and G. P. H., nor the plaintiff, nor any of them, then and there made default in their duty in that behalf. Nevertheless, the defendant, contriving and intending to injure the plaintiff, and wrongfully to deprive him of the fees, profits and emoluments which ought to, and otherwise would, have accrued or accrue to him in that behalf, and to intrude upon and disturb him the said plaintiff in his possession and enjoyment of his said office of Coroner, then and there without any lawful right or authority whatsoever, performed and exercised the office and duty of Coroner within the said manor and lordship, and held within the said lordship or manor, that is to say at, &c., an inquisition upon the remains of the body of the said Thomas Russell, so lying dead within the said lordship and manor as aforesaid; and afterwards, to wit, &c., received and took to his own use divers fees, profits and emoluments for or in respect of the said inquisition so taken and held by him, and wrongfully and illegally defrauded the plaintiff thereof, and prevented him from receiving the same, and from exercising his said office of Coroner of and within the said manor and lordship in the county, &c., and intruded upon and disturbed him the said plaintiff in the possession and enjoyment thereof.

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The case was tried before Pigot, C. B., at the Armagh Summer Assizes of 1847. The plaintiff claimed as the appointee of the persons named in the first count, who were the trustees of the will of the Earl of Kilmorey; and in support of his case, he produced copies of an inquisition, and a patent of the 18th of February, 10 *Jac.* 1, the former showing the possessions of a dissolved monastery, the patent showing a grant from the Crown of these possessions to the ancestor of Lord Kilmorey. The will and codicil of Lord Kilmorey were produced, by which trustees were appointed, who, by a deed of the 5th of January 1839, gave the office of Coroner to the plaintiff. Evidence was also given that some persons who had been appointed to the office of Seneschal had acted as Coroners in the manor of Newry, and that some of these individuals were paid in fees, presented by the Grand Jury of the county of Armagh. Evidence was further given of persons holding appointments under the Kilmorey family, acting as Coroners, by inquests signed by them, produced from the Crown-office of the county of Armagh; and parol evidence was given to the same effect.

The defendant's Counsel, on the close of the plaintiff's case, objected that there was no evidence that at the time of the granting of the patent of *Jac.* 1, the Crown had vested in it any right, title or authority to grant to a subject the privilege of appointing a Coroner for the manor or lordship of Newry, and that no such right was then vested in the Crown; that it had no authority to grant to a subject the power of making an exclusive appointment of Coroner, or of appointing a Coroner having exclusive authority to act as such within the manor and lordship of Newry; that even if the Crown had the power of granting a right to appoint a Coroner, the patent of James the First does not confer such power on the patentee. Other objections were made, but the case turned on the construction of the patent; and the Chief Baron ultimately, on the consent of the parties, directed a verdict for the plaintiff, with liberty to change it into a nonsuit, or have a verdict entered for the defendant.

The patent bore date the 18th day of February, 10 *Jac.* 1; and by it the Crown did give, grant, bargain, sell and confirm to Arthur

Bagnall, his heirs and assigns for ever, "All that the late dissolved  
 "monasterie, religious house or college of the Blessed Virgin Marie  
 "and Saint Patrick, of Newrie, alias *de Vinde Ligno*, in the county  
 "of Down; and also the scite, circuite, ambite and precinct of the  
 "said late monasterie, religious house or college; and also the castle  
 "of the Newrie wherein the said Arthur Bagnall now dwelleth,  
 "together with the bawne, &c., and also the whole town of Newrie  
 "in the county aforesaid," &c.

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After the enumeration of a great many townlands, the patent  
 bestowed on Bagnall "the advowson, noiacon, donation, presen-  
 "tation and right of patronage of the vicarages of the church of  
 "Newrie aforesaid," and "all tithes, as well great as small;" "and  
 "also a mercatt to be holden at the town of Newrie aforesaid, every  
 "Thursday weekly, together with all tolls, customs, profits and  
 "commodities to the said market belonging, incident or appertain-  
 "ing;" "and also the assize of bread, ale and wine in the said  
 "town of Newrie;" "and also one courte to be holden at the said  
 "town of Newrie, and in or within the precinct and limits of all  
 "and singular the towne, villages and lands, tenements, plowlands,  
 "balliboes and carews aforesaid, or any of them, to be holden  
 "before the Seneschal or Seneschals of the said Arthur Bagnall, his  
 "heirs and assigns, together with power in the same courte to hold  
 "pleas of all and singular actions and trespasses, covenants,  
 "accompts, contracts, detinues, debts and demands whatsoever, not  
 "exceeding the value of one hundred marks Irish, as well in debts  
 "as in damages, with all and singular profits, amerciaments, fynes,  
 "commodities, advantages and emoluments whatsoever to the afore-  
 "said courte belonging, incident or appertaining, or thereupon,  
 "thereby or therewith coming or arising; and also all and singular  
 "fynes and amerciaments which shall be from time to time imposed,  
 "assessed, adjudged or decreed at any Assizes or Sessions what-  
 "soever to be holden in the aforesaid counties, or any of them, upon  
 "any the inhabitants, or in or within the aforesaid towns," &c.

The patent then, after a great many other grants, also granted  
 "all and singular the castles, &c., fee-farms, annuities, knights' fees,  
 "wards, marriages, escheats, reliefs, heriots, ffynes, amerciaments,

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"courtes leets and views of frank-pledge and courtes baron belonging or appertaining, with the perquisites, ffynes, amerciaments and profits thereof, wayffs, estraies, goods and chattels of felons and of such as fly for felony, of felons of themselves, outlaws, and of condemned persons and such as are put in exigent, wrecks of the sea, deodands, faires, markets, tolls, customs, rights, jurisdictions, liberties, immunities, franchises, privileges, advantages, profits, commodities, emoluments and other hereditaments whatsoever, with the appurtenances," &c., "that he the said Arthur Bagnall, his heirs and assigns shall and may from henceforth for ever hereafter have, hold and enjoy in and within the premises before by these presents given, granted, bargained, sold and confirmed, and in and within everie part and parcell thereof, all and singular, such soe many and the like courtes leets, viewe of frank-pledge, law dues, assize of bread, wyne, and all wayffes, estraies, the goods and chattels of felons and fugitives, and of felons of themselves, and of persons condemned and put in exigent, deodands, wrecks of the sea, knights' fees, wards, marriages, escheats, reliefs," &c., "and in as large and ample manner and form as the premises, or any part thereof, came or of right ought to come to our hands or to the hands of any of our progenitors or predecessors, Kings or Queens of England, or as the same now are, or ought in any wise to be, in our handes and possession, &c., saving alwaies and foreprised out of these our letters patent, all the lawfull right, title, estate, clayme and demand of all our loving subjects, of, in or to the premises, or any part or parcell thereof," &c., "to have, hold," &c., "unto the said Arthur Bagnall, his heirs and assigns for ever," &c. "Further we doe by these presents, for us, our heirs and successors, give and grant unto the said Arthur Bagnall, his heirs and assigns, that they and every of them shall and may for ever hereafter have, hold and keep one courte in the nature of a courte baron within the said manor of Newrie, and the limits or precincts thereof, from three weeks to three weeks, to be holden before the Seneschall or Seneschalls, by the said Arthur Bagnall, his heirs or assigns, to be nominated, constituted and appointed, and that all and every such Seneschall or Seneschalls from time to time to be nominated,

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"constituted and appointed, shall and may have, use, exercise and  
 "enjoy, by virtue of these presents, full power, authority and juris-  
 "diction in the same courte, to hold pleas of all manner of debts,  
 "trespasses, covenants, accounts, detinues, and of all other causes,  
 "contracts and matters whatsoever, which in debts and damages doe  
 "not exceed the sum of forty shillings current money of and in Eng-  
 "land, happening, arising, committed or perpetrated in any of the  
 "castles, townes, villages, lands, tenements and other hereditaments  
 "above by these presents given, granted," &c., "within the said  
 "manor of Newrie or the limits or precincts of the same; and further  
 "to hear, determine and execute in the same courte all and singular  
 "such the like actions, causes and matters which either may or are  
 "accustomed to be heard, determined and executed in any courte  
 "baron within our said realm of England, or within our said realm of  
 "Ireland, together with all jurisdictions, privileges, prehemenences,  
 "authorities, franchises, liberties, immunities, ffynes, amerciaments,  
 "perquisites, profits, commodities and emoluments whatsoever, to  
 "the same or the like courte belonging, incident or appertaining,  
 "or comminge, growinge or arising out of the same or the like  
 "courte, without any account, somme or sommes of monie or other  
 "things whatsoever, to be yielded unto us, our heirs or successors,  
 "of or for the same;" "and further, we doe give and grant full, free  
 "and absolute liberty, license, power and authority unto the said  
 "Arthur Bagnall, his heirs and assigns, that he the said Arthur  
 "Bagnall, his heirs and assigns, for ever hereafter shall and may have,  
 "hold, keep and enjoy within the said manor of Newrie, and within  
 "all and singular the said castles, townes, &c., one courte leete or  
 "view of frank-pledge, and also all things incident, belonging or  
 "appertaining to a courte leete or view of frank-pledge, to be holden  
 "and kept twice in every year before the Seneschall or Seneschalls,  
 "by him the said Arthur Bagnall, his heirs and assigns, or any of  
 "them, from time to time to be nominated, constituted and appointed,  
 "according to the form of the statute in that case made and pro-  
 "vided," &c., "and that all and everie the Seneschall and Seneschalls  
 "soe from tyme to tyme by the said Arthur Bagnall, his heirs and  
 "assigns, to be nominated, constituted and appointed severally and

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"respectively in each of the said manors whereof or wherein he or they shall be nominated, constituted and appointed Seneschall or Seneschalls as aforesaid, shall and may have, exercise and enjoy, by virtue of these presents, full power, libertie, authority and jurisdiction in each and everie of the said several courtes leetes and views of frank-pledge, severally and respectively to inquire of all and singular felonies, trespasses, deceits, preprestures, recusancies and all other crymes, offences and matters whatsoever which may or ought to be inquired of in any courte leete or view of frank-pledge, which shall be committed, perpetrated or done, or which shall happen in or within any the manors, lordships, &c., above by these presents granted," &c., "and further to doe, ordayne, use, exercise and execute in each service of the said several courtes leets and views of frank-pledge, all other matters and acts whatsoever which may be done, ordayned, used, exercised or executed in any courte leete or views of frank-pledge by the laws or customs of our said realme of England and Ireland, or either of them; and that he the said Arthur Bagnall, his heirs and assigns, shall and may for ever hereafter have, receive, levy, deteyne, and to his and their onlie and proper use convert all and singular perquisites, profits, ffynes, amerciaments and commodities whatsoever, arising, coming or growing, of, in or by the said several courtes leetes or views of frank-pledge, or any or either of them, or to them, or any or either of them, or to the like courtes leete or views of frank-pledge, incident, belonging or appertaining," &c. The office of clerk of the market was also granted to Bagnall, his heirs and assigns, and full power "to make, constitute, ordain and appoint some such fit person as he or they shall think fit to be the bailiffe of the said manor or lordship of the Newrie," &c., "and that everie of the said bailiffes," &c., "for, and during, such time as he or they shall be bailiffe or bailiffes as aforesaid, shall and may have return and execution of all manner of writs, executions, precepts, warrants, summons, attachments and mandates of us, our heirs and successors," &c., "within such of the said manors and the precincts of them and every of them whereof he or they shall be bailiffe or bailiffes, returnable either before us, our heirs and successors, or

“before any the justices or commissioners of us, our heirs and successors, and prosecuted or to be prosecuted, and to be returned, as well at the suite of us, our heirs and successors, as at the suite of any our subjects whatsoever, so as no sheriff, bailiffe or other minister of us, our heirs,” &c., “may enter into the said manors or lordships of,” &c., “or into any of them, or into the precincts of them, or any of them, at any time or by any means howsoever, to execute, prosecute or serve any such like writs, precepts, warrants, summons, attachments, mandates or distresses, which ought to be executed or served within the aforesaid manor,” &c. The patent contained this proviso: “Notwithstanding any defects in the misnaming or not naming of any tenant, farmer, occupier or possessor of the premises or of any part or parcel thereof, and notwithstanding the statute made and established in the Parliament in the eighteenth year of the reign of our noble predecessor King Henry the Sixth, late King of England; and notwithstanding any other defects in the not naming or misnaming the nature, kind, quantitie or qualitie of the premises, or of any part or parcel thereof,” &c.

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A rule *nisi* having on a previous day been obtained, in pursuance of the leave reserved at the trial, cause was now shown by—

*Napier and Holmes, with whom was S. B. Miller.*

The question in this case is, as to the jurisdiction of the Coroner of Newry, whether that jurisdiction extend to that part of Newry which lies in the county of Armagh, of which county the defendant is Coroner? Newry is situated in two counties, viz., Armagh and Down, and the defendant having held inquests on bodies in that portion of the manor of Newry, situate in the county of Armagh, the plaintiff instituted the present action to try his right to do so, as the plaintiff claims the exclusive right to hold inquests in that portion of the manor of Newry. He derives that claim under letters patent to the Kilmorey family, granting to the ancestor of that family the right of appointing a Coroner in that manor. At the trial we proved a number of appointments to this office by the Kilmorey family, as evidence of the exercise of the right under the patent, and a number of inquests held by the persons so appointed, with-

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out question. The copy of an inquisition held at Newry on the 27th of October, 10 *Jac.* 1, was given in evidence; by which it was proved that Arthur Bagnall was seised of all lands, hereditaments, purchases and privileges belonging to the late dissolved religious house of the Blessed Virgin Mary and St. Patrick, in Newry. There were courts leet held in the manor of Newry, and the appointment of Seneschal to these was in the Abbot of the religious house. These courts then formed a portion of the possessions belonging to that religious house; and accordingly by letters patent of the 18th of February, 10 *Jac.* 1, every thing that had been enjoyed by the Abbot and the religious house devolved on and were given to Arthur Bagnall, the patentee. Though the word "Coroner" be not used in the patent, yet language is adopted sufficient to include that officer; for the duties which the Seneschal performed necessarily belong to the office of Coroner. The patent conferred on Bagnall the right to hold a market in the town of Newry, the assize of bread, ale and wine, and a court to be holden within the limits granted, before the Seneschal of the said Arthur Bagnall, his heirs and assigns, "to hold pleas of all and singular "actions and trespasses, covenants, accounts, contracts, detinues, "debts and demands whatsoever, not exceeding the value of 100 "marks Irish, as well in debts as in damages, with all and singular "profits, amerciaments, fines, commodities, advantages and emoluments whatsoever to the said court belonging," &c. It also granted to the patentee "wayffs, estraies, goods and chattels of felons, and of "such as fly for felony, of felons of themselves, outlaws, and of condemned persons, and such as are put in exigent, wrecks of the sea, "deodands," &c., and that "Arthur Bagnall, his heirs and assigns, "shall and may from henceforth for ever hereafter have, hold and "enjoy in and within the premises before by these presents given, "granted, &c., and in and within everie part and parcel thereof, "all and singular such soe many and the like courtes leets, view "of frank-pledge, law dues, assize of bread, wyne and ale, wayffes, "estraies, the goods and chattels of felons and fugitives, and of felons "of themselves, and of persons condemned and put in exigent, deodands," &c., "in as large and ample manner and form as the

"premises, or any part thereof came, or of right ought to come to our hands, or to the hands of any of our progenitors or predecessors," &c. The words "felons of themselves" show that the duties of the office of Coroner were impliedly attached to that of Seneschal, and that the latter was Coroner *de facto*. In another part of the patent there is given the power to appoint the bailiff to each of the manors granted, and that each bailiff "shall and may have return and execution of all manner of writts, executions, precepts, warrants, summons, attachments and mandates of us, our heirs and successors," &c., "so as no sheriffe, bailiffe or other minister of us, our heirs or successors, may enter into the said manors or lordships of Newry, &c., or into any of them, or into the precincts of them, or any of them at any time, or by any means howsoever to execute, prosecute or serve any such like writts, precepts, warrants, summons, attachments, mandates or distresses, which ought to be executed or served within the afore-said manors," &c. Thus no one could enter into these manors to do the duties prescribed, except the appointees of the patentee.

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Then, if that language of the patent comprehend the duties of a Coroner and give the right to appoint one, that right must be an exclusive one. *Jewison v. Dyson* (a) precisely governs the present case: and in *Cowel's Interpreter*, tit. *Coroner*, it is said that colleges may appoint Coroners. In *Jewison v. Dyson*, there was a concurrent acting by two Coroners, and the right there was grounded on a charter of Edward the Third to the Earl of Lancaster, giving him power to appoint a Coroner exclusively to that Duchy of Lancaster. There is a statute giving power to the freeholders of the county to appoint the Coroner, but it saves those franchises or peculiar jurisdictions where that power is vested in the lord of the manor. Here the duties to be performed, and the terms of the patent, establish that the right to appoint a Coroner was in Arthur Bagnall; the Abbot of the dissolved monastery appointed previously, and that right was transferred to Bagnall without change. It may be objected that, as the appointment of the

(a) 9 Mees. & Wels. 540.

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present Coroner was made by the trustees of a term, it is bad, but the same objection would apply to a tenant for life; they, however, represent the ownership. However, the real question is, did the words of the patent convey the right of appointing a Coroner?

*Tomb and Whiteside* (with whom were *O'Hagan* and *Perrin*),  
 contra.

There is not one word in this patent which gives to Arthur Bagnall the right to appoint a Coroner; and it does not contain any one expression similar to the language on which the case of *Jewison v. Dyson* rested, except the word "bailiff." There was certainly by the patent a power given to appoint a Seneschal who was to hold a manor court, and who had power to grant decrees; and the office of bailiff was for the purpose of returning civil writs and processes, an object common to all manor courts. In *Atkinson's Office of Sheriff*, p. 42, it is said, "Bailiffs of liberties are those "bailiffs who are appointed by every lord within his liberty, to "execute process and do such offices therein as the Under-sheriff "does at large in the county." They therefore were merely appointed to return civil writs. In *Jewison v. Dyson* the word "Coroner" was expressly used, and so also were the words "pleas of the Crown;" but in the present patent none of these words expressly or by implication are used. It was on the words "pleas of the Crown" the judgment in that case rested, it being the duty of the Coroner to return pleas of the Crown: *Com. Dig. tit. Office*, B, 5. The patent here does not recite that the power of appointing a Coroner was in the religious house, nor is there a word in it about Coroner or the duties of a Coroner. This patent was granted in the reign of James the First, when the Crown had no right to appoint a Coroner; for by 28 *Edw.* 3, c. 6, it is ordained that the Coroner should in every instance be chosen by the freeholders, save and except where the Crown had a previous right. Here the Crown had no previous right, but the patent in *Jewison v. Dyson* was granted before the passing of that statute; the present patent gives no such right as would empower the patentee to appoint a Coroner, to the exclusion of the freeholders' rights. They

gave evidence that Seneschals, who had been appointed under the patent, had, for forty years, intruded themselves into the office of holding inquests, but that practice was altogether irregular; inquests were often held by Magistrates. In civil cases the proceeding by attachment was used to enforce appearance: 1 *Reeves, Eng. Law*, pp. 121, 481, 482, 483. So that the words "summons" and "attachment," used in this patent, refer merely to civil processes, mere ministerial duties. From the time of Edward the Third to the present day, the right of the freeholders to appoint a Coroner has been sanctioned, and no custom can take away that right from the public. The title to appoint to the enjoyment of a franchise must be made out by charter or grant, and not by prescription or usage: *Co. Lit.* 114, *a*. This patent expressly saves the rights of the public; but even admitting that this patent gave the right, it cannot give the exclusive right: *Dominus Rex v. Solgard (a)*. There is then a concurrent jurisdiction, and there are many instances where other Coroners act besides the county Coroners. The office of bailiff and Coroner is quite distinct: 9 *Rep.* 29, *a, b*; and the grant of the office of Seneschal cannot refer to the office of Coroner. Courts leet are for civil purposes, and apply to living matters; Coroners' functions have reference to the dead. All the writs specified in this patent are civil processes, and the excluding words in it are, "bailiff or other minister of us," which do not exclude the county Coroner. They would exclude the Sheriff or other bailiff.

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*Holmes*, in reply.

We admit the word "Coroner" is not in this patent, yet there are equivalent words which give the right of appointment to this office, and there was no evidence offered that any county Coroner ever acted in this exempt jurisdiction, until the defendant interfered with the right of the Kilmorey family. We, on the plaintiff's part, established the uninterrupted usage of persons executing the duties of Coroner under appointments made under this patent, and it is unimportant whether that appointment was in the religious house, the Bagnalls,

(a) 2 *Stra.* 1097.

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or the Kilmorey family. The patent gave "the goods and chattels of felons, and of felons of themselves, and of persons condemned," &c. It gave the power to appoint a bailiff, whose position in ancient times was equal to that of Sheriff; and that bailiff was to "have the return and execution of all manner of writs, precepts, warrants, mandates and attachments—mandates of us, our heirs and successors." Surely these words imply criminal proceedings. It is argued here that the word "attachment" can have reference merely to the civil side of the Court, and does not include "pleas of the Crown;" but attachments even at the civil side of the Court are in the nature of a criminal proceeding. We contend that the power to appoint a bailiff given by this patent included and meant the office of Coroner; for if a person be appointed to do certain duties, without naming the office to which those duties are incident, the office is thereby necessarily conferred: *Newland v. Cliffe* (a). As to the office of bailiff, *Co. Lit.*, p. 168, b; and that it includes the office of Coroner, is evident from Magna Charta. 9 *Hen.* 3, c. 17, takes away the power to hold pleas of the Crown from certain officers, and, amid others, "Coroner" is enumerated with "other bailiffs of the King." The 4 *Edw.* 1, statute 2 (*De Officio Coronatorum*), shows what the attachments are which the Coroner is bound to execute; and the words in our patent are equivalent to the words used in that statute, and can by no means be confined to attachments on the civil side of the Court. No one could proclaim a person to outlawry except the Coroner: *Co. Lit.*, p. 128, b; *Dalton's Office of Sheriff*, pp. 236–40; *Proctor's case* (b). If any one were to be outlawed in this exempt jurisdiction, it could only be done by the writ of exigent, and no one could execute that except the bailiff. So, that taking the duties of the bailiff into consideration, and the fact that the acting as Coroner has been acknowledged in this jurisdiction to be in the grantees under this patent, and also that presentments have been fiatd for these persons so acting as Coroners, it is impossible for the Court to direct a nonsuit.

*Cur. ad. vult.*

(a) 3 B. & Ad. 630.

(b) 2 Dyer, 222, b.

PERRIN, J., delivered judgment.\*

This case comes before the Court on an application to set aside the verdict had by the plaintiff, at the last Armagh Assizes, before the Lord Chief Baron; or that it be changed into a verdict for the defendant; or that a nonsuit be entered pursuant to the leave reserved.

This was an action on the case for disturbing the plaintiff in the office of Coroner; he claiming to be the Coroner of the lordship and manor of Newry under an appointment from the trustees of Lord Kilmorey, who is the heir of Arthur Bagnall, to whom James the First had granted the possessions of the dissolved monastery or college of the Virgin Mary and St. Patrick, of Newry, in the counties of Down and Armagh; and also the site of the said late monastery and the castle of Newry, and also the whole town of Newry, and a market to be holden in Newry, together with all tolls, customs, profits and commodities to the same belonging, and also the assize of bread; and also a Court to be holden before the Seneschal, together with power in the said Court to hold pleas of all and singular actions and trespasses, covenants, accounts, contracts, detinues, debts and demands whatsoever, not exceeding the value of one hundred marks, Irish, as well in debts as in damages.

It is argued on behalf of the plaintiff, that by this grant are impliedly given the right and power to appoint a Coroner of the lordship and manor of Newry; for the defendant it was said, that he being the Coroner of the county of Armagh, it is his right, as county Coroner, to hold inquests in this particular district.

There were many objections made at the trial; but at the conclusion the Chief Baron suggested, whether a question of fact or presumption existed for the jury, upon the evidence of the alleged usage for a long series of years, as to the right of appointing a Coroner by the dissolved monastery, previous to the patent? This was refused by the plaintiff, whereupon the Judge directed a verdict

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\* BLACKBURN, C. J., was at the Special Commission, and CRAMPTON, J., was engaged at Nisi Prius.

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for him. The only question argued before us is, whether upon the true construction of the letters patent, they show and convey a right to Arthur Bagnall to appoint a Coroner in the lordship and manor of Newry? The letters patent are dated the 18th of February in the tenth year of the reign of James the First; and they grant, as I before said, the house or college of the Virgin Mary and St. Patrick, and the possessions thereof, to Arthur Bagnall, his heirs and assigns for ever; they also grant the power of holding a weekly market, and of receiving the tolls thereto belonging; also the assize of bread, and all lands belonging to the said monastery. They also grant the right of holding a Seneschal's Court, and all "wayffs, estrays, goods and chattels of felons, and of such as fly for felony, of felons of themselves, outlaws, and of condemned persons, and such as are put in exigent, deodands, wrecks of the sea," &c. Further on they grant the power of holding a court baron within the said manor. It was argued, though not very precisely, that under these terms there was a power given of appointing a person to do the duties of a Coroner, and therefore that they necessarily imported the right of appointing a Coroner. These words are relied on—"Goods and chattels of felons, and of such as fly for felony, of felons of themselves, outlaws, and of condemned persons, and such as are put in exigent." Then also there was the grant of a Court of Pie Poudre, and of the office of clerk of the market, and authority to appoint a bailiff of the manor or lordship of Newry, who was to have return and execution of all manner of writs, executions, precepts, warrants, summonses, attachments and mandates. The word "attachments" is there mentioned, and reading it in conjunction with the other words, it plainly means the process of civil actions. These are the ordinary words used in Crown patents of that period; and I never before heard that they gave the power of the appointment of Coroners.

This argument was rather thrown out as matter of consideration than pressed closely. In the non-intromittant clause are these words:—"So as no Sheriff, bailiff, &c., may enter into the said manor or lordship of Newry, &c., to execute, prosecute, or serve any such like writs, precepts, warrants, summons, attachments,

' mandates, or distresses,' &c., that is, those writs mentioned before, which are confined to writs in civil proceedings; nowhere are Coroners mentioned in these letters patent, nor is there any mention of the existence of such an office. There is no grant of it, nor of the appointment of any of the officers named to do the duties of Coroner; no words to infer that the Seneschal was to do them; nothing, in short, to infer the power of such an appointment in the patentee. There is a power to appoint a Seneschal and clerk of the market, and a bailiff to return writs, and amongst these attachments are included; such powers in short as are granted in the creation of manors and liberties; but neither in the granting or the excluding part of the patent is there any mention of, or allusion to, Coroners. It is not immaterial to observe, that at the time of the granting of these letters patent there was no power in the Crown, even by express words, to grant the office of Coroner.

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But again, it is argued on behalf of the plaintiff, that by "attachments" we are to understand attachments of pleas of the Crown, and that reading it with the preceding words, "summons, precepts, mandates," &c., we are to apply them to pleas of the Crown, to which the other words do not apply; and we are called on to affix this construction to them on the authority of *Jewison v. Dyson (a)*, where it is said words of similar import were held to convey to the Duchy of Lancaster the right to appoint a Coroner. But the words are not at all similar. In the grant there, these words are used—"attachiamenta tam de placitis Coronæ quam de aliis quibuscumque;" and in the intromittant clause were these words:—"Seu ad attachiamenta de placitis Coronæ vel aliis prædictis aut aliquod aliud officium ibidem faciendum." It is thrown out that these words are to be imported into the present grant, that being of the lordship of a manor, and that we are to read "attachments" as if they were pleas of the Crown; but that case affords no foundation for the present, for the grants are as contra-distinguished as words can make them.

Another argument was founded on the word "exigent;" that

(a) 9 Mees. & Wels. 540.

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"Coroner" must thereby be necessarily meant, as he was the person who was to proclaim the party, and that therefore the intention was to give the appointment of that officer to the patentee. The words of the patent are, "the goods and chattels of felons, and "of felons of themselves, and of persons condemned and put in "exigent." These words do not mean that the outlawry was to take place within these very precincts; but that no matter where it took place, if the goods and chattels of the person proclaimed were within the liberty, they were thereby granted to the grantee. The cases of *Rex v. Capper*, and *Rex v. Marquis of Downshire* (a), are precise on this subject to show what the rules applicable to Crown patents are, and they directly meet this argument. I need but refer to the observations of Lord Abinger in that case in *Mees. & Wels.*, where he says:—"The question is this, whether or not the words of the "charter were sufficient to convey to the Duchy of Lancaster the "right of appointing a Coroner within the district of the honor of "Pontefract? The words are, '*attachiamenta tam de placitis "Coronæ quam de aliis quibus cumque*," and the words are followed "by a declaration, that none of the King's ministers or bailiffs "shall interfere with the rights granted to the Duchy. Then at "the conclusion 'our Coroners' are mentioned, amongst others, who "shall not interfere." Not one of the grounds of that judgment is to be found in the present case. The one was a grant of the Duchy Palatine of Lancaster, the other of the lordship of Newry; the one a grant before the time of Henry the Eighth, when the Crown had the right of granting the office of Coroner; the other in the time of James the First, when the Crown could not grant the office. I am therefore of opinion that the verdict must be set aside, or a nonsuit entered.

MOORE, J.

I concur with my Brother PERRIN, and for the reasons he has so clearly stated. I think the rule ought to be granted on the three grounds; first, that the plaintiff was bound to show that the Crown

(a) 5 Price, 217, 269.

had the power to grant the office of Coroner, and that we are not to presume the Crown had that power, especially as the plaintiff declined acceding to the suggestion of leaving a presumption to the jury on the usage, and as a statute had passed long previously to the grant in question being made, giving that power of appointing Coroners to the freeholders of the county at large: on that part of the case, in making out power to be in the Crown to grant, I think the plaintiff wholly failed. Secondly, on the construction of the patent, it does not appear that the Crown gave the power of appointing a Coroner, either by express words, or by words denoting it by necessary implication. The only words at all leading to such an inference are those giving a power of appointing a bailiff, but in the patent it is clear his duties have reference to civil process only. Nor thirdly, are there any words in the patent itself which by clear and necessary implication would give the office of Coroner; these words are used, "goods and chattels of felons and fugitives, "and of felons of themselves, and of persons condemned and put in "exigent," &c. It appears to me that, looking at the expressions, they merely mean that it was the intention of the Crown to grant the goods of the persons there mentioned—the grant of the goods of an individual outlawed, remaining within the jurisdiction, no matter where the outlawry took place. The word "attachments" is put in conjunction with civil process, and nothing else, and there is abundance in the words in connection to limit its meaning. What is there to warrant its extension and to say that it means pleas of the Crown? There is nothing in this patent, no express or implied words to give the office of Coroner. The case in 9 *Mees. & Wels.* is essentially different, because in that case there were express words; a clear and necessary implication whence the office of Coroner was to be given. I think, therefore, that a non-suit should be entered, and with costs.

Nonsuit entered.

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# JAMES O'NEILL FALLS

v.

## THE BELFAST & BALLYMENA RAILWAY COMPANY.

*June 5.*

**A writ of mandamus** recited the B. and B. Railway Act, and its incorporation with the Lands Clauses Consolidation Act, and Railway Clauses Act; and after setting out the 68th section of the last Act, stated that the prosecutor was in the occupation of a piece or parcel of ground adjoining the said railway, &c.; and also in occupation of another piece or plot of ground, strand or slob, adjoining, &c., and running back to low-water mark in the Belfast Lough, &c.; and that he had erected a dwelling-house, &c., and that his principal inducement for so doing was the situation of said property contiguous to the sea, affording facilities for the enjoyment of sea bathing, fishing and shooting; that the Railway Company had raised an embankment upon and over a portion of the lands in his occupation, and by reason thereof he and his family were excluded access to the sea; that by notice he had called on the Company, specifying the accommodation works required to be made by them in consequence of the interruption to the use of his lands, &c.; and that they were not works with respect to which he had agreed to receive compensation instead of the making of said works; that the Company declined to execute the same: and concluded by commanding the Company to make such communication under the railway as should be necessary for the purpose of making good the interruption caused by the railway to the use of the lands in the prosecutor's occupation.

The return set out several notices to treat served by the Company on the prosecutor for the purchase of his lands, and then set out the 94th section of the Lands Clauses Consolidation Act, and averred that the land divided by the railway embankment was and is of much less value than the expense of making a communication between the intersected lands; that the Company called on him to sell the said piece of land, and that the prosecutor failed to treat, and that they then offered him compensation, and he declining, they summoned a jury to assess the compensation; that the prosecutor did not attend before the jury, and that the Company then required a surveyor to make the necessary valuation of the premises, the amount of which valuation they tendered the prosecutor, who refused to receive the same; and that they then paid the same into the Bank of Ireland, and that the lands in question thereby vested in the Company. *Held*, on demurrer, that such was a valid return, and that property of the sort described in the writ was a subject of compensation within the Lands Clauses Consolidation Act. [CRAMPTON, J., *dubitante*.]

*Held also*, that the words "such land" in the 94th section of that statute refer to the general heading of the enactment, and do not refer to land in a town, or land built upon, in the 93rd section.

therein contained; and that said Company should be incorporated by the name of the Belfast and Ballymena Railway Company, and by that name should be a body corporate with perpetual succession, and should have power to purchase and hold lands for the purposes of the undertaking, within the restrictions in the said Acts contained; and that said special Act, after reciting, amongst other things, that plans and sections of the Railway, showing the line and levels thereof, and also that books of reference containing the names of the owners, lessees and occupiers, or reputed owners, lessees and occupiers, of the lands through which the same was intended to pass, had been deposited with the Clerk of the Peace of the county of Antrim, &c. It was by said special Act enacted that, subject to the provisions therein, and in the said recited Acts contained, it should be lawful for the said Company to make and maintain the said Railway and works in the line and upon the lands delineated in the said plans and described in the said books of reference, and to enter upon, take and use such of the said lands as should be necessary for such purpose. And it was thereby further enacted that the said Railway should commence at or near the junction of York-road and Ship-street, in the said town of Belfast, and should pass through or near the several parishes and places therein named; and, amongst others, through and into, or into the townland of Greencastle, in the county of Antrim.

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The writ then recited the Railways Clauses Consolidation Act (1845), and its incorporation with the special Act, and set out the 68th section of the Railways Clauses Act, and thus proceeded:—  
“And whereas we have been given to understand and be informed  
“in our Court here, by James O'Neill Falls of Greencastle, in the  
“county of Antrim, attorney-at-law, that he is in the occupation of a  
“piece or parcel of ground adjoining the said Railway, lying within  
“the sea mark, and adjoining on the west on the road leading from  
“Carrickfergus aforesaid, and on the east adjoining Belfast Lough,  
“and situate in the townland of Greencastle, otherwise Cloughcastle,  
“in the county of Antrim; and also that the said James O'Neill  
“Falls is in the occupation of another piece or plot of ground, strand  
“or slob, adjoining the said Railway, on the east side of the road

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"leading from Belfast to Carrickfergus, next adjoining on the north thereof, the property of the said James O'Neill Falls, and running back to low-water mark in the Belfast Lough; and is also in the occupation of another piece or plot of ground, strand or slob, adjoining the said Railway, on the east side of the said road leading from Belfast to Carrickfergus aforesaid, next adjoining on the south thereof, the property of the said James O'Neill Falls, and running backwards to low-water mark in the Belfast Lough, and in the said townland of Greencastle, otherwise Cloughcastle, and county of Antrim."

The writ then averred that James O'Neill Falls had, within the last ten years, erected a dwelling-house, offices and other improvements on the said pieces or parcels of land, and expended thereon from £1500 to £2000, and that his principal inducement in expending such money was the situation of said property so contiguous to the sea, affording facilities to him and his family to enjoy sea-bathing, fishing and boating; that there was a small rivulet running at the south side of the premises, from which a gut had been formed by the said rivulet, and the sea ebbing and flowing thereto, and through which at all times of the tide, before the erection of the embankment thereafter mentioned, a boat could have passed to and from the sea close up to the lawn at the rear of said premises; that the rights of sea-bathing, boating and fishing had been constantly exercised by the occupiers of the said premises for the last fifty years, and by Falls's family and servants up to the period of the erection of the Railway embankment, upon and through the said lands; that the Railway Company had raised an embankment upon and over a portion of the lands in his occupation, and that by reason of such embankment he and his family and servants were completely excluded from access to the sea, and that said embankment was about twenty feet high from low-water mark; that by reason of said embankment great interruption had been caused to the use of said lands.

The writ then stated that, by notice of 29th of September 1847, Falls had called on the Company, specifying the accommodation works required to be made by them in consequence of the inter-

ruption to the use of the lands caused by the said embankment, and that he caused to be annexed to said notice, and served at the same time, a plan or sketch of the accommodation works required; that such works were necessary to make good the interruption caused by the said Railway to the use of his lands, and that they could be made in such a manner as not to obstruct the using or working of the Railway, and that the works required were not works with respect to which Falls had agreed to receive or been paid compensation instead of the making of said works; that the Company declined to execute the works, although a reasonable time had elapsed during which they might have been made. The writ concluded by commanding the said Belfast and Ballymena Railway Company forthwith without delay to make, or cause to be made, such convenient arch, tunnel or passage under the said Belfast and Ballymena Railway as shall be necessary for the purpose of making good the interruption caused by the said Railway to the use of the lands in the occupation of the said James O'Neill Falls, through which the said Railway has been formed, pursuant to the provisions of the said Acts of Parliament, or show cause to the contrary thereof, &c.

The return of the Company stated that, on the 13th of March 1846, and previous to the issuing of the writ of mandamus, they served a notice to treat on Falls for the purchase of his lands, parcel of the premises in the writ mentioned, and also for the compensation to be made him for any damage that might be done by the execution of the Railway works, and that if within twenty-one days he did not comply with said notice, they would proceed as they were entitled; that Falls failed to treat with the Company, and after twenty-one days from the service of the notice, they, on the 27th of December 1847, served another notice on him offering him £85 for the interest he was able to sell in the said lands, slob or strand, and as compensation for all the damage he might sustain by the execution of the works, and that if such offer were not accepted, the Company would issue their warrant to the Sheriff to summon a jury.

The return then set out the 94th section of the Lands Clauses Consolidation Act (1845), and then stated that the part of the land of said Falls, divided by the Railway embankment, and which part lies

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between the embankment and the Lough of Belfast, was and is of much less value than the expense of making a communication between the lands so divided, as the promoters of the undertaking are compelled to make, by virtue of the several statutes in that case provided; that Falls having no other lands adjoining the piece of land so separated and lying between the embankment and the sea, and Falls having required them to make such communication, they called on Falls to sell the said piece of land lying between the embankment and the sea, and thereupon served another notice on Falls, dated the 22nd of November 1847, requiring him to treat for the purchase of the said land, slob, or ground covered with water at ordinary tides, lying between the embankment and the sea; that Falls again failed to treat, and that on the 27th of December 1847, by another notice, the Company offered Falls £5 for his interest in the same and as compensation for all damages, and that if within ten days he did not accede thereto the Company would issue their warrant for a jury to assess the money to be paid for the purchase of said slob or ground; that Falls still disregarding these notices, the Company issued their warrant to the Sheriff of the county of Antrim on the 1st of March 1848, to summon a jury to ascertain the sums to be paid to Falls for the respective parcels of land referred to in the notices, and also the sum to be paid for the damage, if any, to be sustained by Falls in respect of the purchase thereof, and also the value of the slob, and also what would be the expense of making a communication by an arch under said Railway, or such other communication as the Company were required to make between said slob ground and the other lands so divided by the embankment.

The return further stated that, by notice of the 4th of March 1848, Falls was informed of the inquiry to be held on the 16th of March, in the town of Belfast; that the jury were summoned and attended (setting out their names); that Falls did not appear before them; that thereupon application was made to two Justices (satisfactory proof being given them of Falls's default), who on the 20th of March 1848 nominated a surveyor to determine the compensation to be paid to Falls for his lands, and the expense of a communication; that the surveyor made the declaration required

by the statute before making his valuation; and by such valuation declared that £1 was the value to be paid by the Company for the piece of ground occupied by the Railway embankment, £49 were the compensation for Falls's damage by the execution of the works, and £5 the value of the slob severed by the embankment, making in all £55. The return then averred that, on the 20th of April 1848, the Company tendered Falls the said sums of money, which he refused, and that on the 26th of April same were deposited in the Bank of Ireland, and that on the 27th of April the Company executed a deed poll containing a description of the lands in respect whereof said deposit was made; that same was made to the credit of Falls, and said deed poll was stamped with the duty which would have been payable upon a conveyance to the Company of the lands comprised therein; and that by means of the premises all Falls's interest vested in the Company. That previous to the taking of any proceedings by the Company, their whole capital was subscribed, and that to make the works required by Falls would greatly obstruct the working or using the Railway for two months at least, and that for these reasons the Company submitted that they should not be required to make such arch, tunnel or passage under the Railway as the writ of mandamus commanded.

Demurrer, that by said return there is not shown the application of any statutable enactment so as to bar Falls's right to the accommodation works required; that the exceptions in the Lands Clause Consolidation Act (1845) are not negatived, and that no authority is shown for the service of the several notices, or the appointment of a surveyor; that it is not shown that the lands are not situate in a town or built upon, nor that the land so separated does not exceed the quantity of land for extraordinary purposes prescribed by the Act of Parliament to be taken by the Company; and that the said return, if intended as an excuse for not complying with the mandatory part of the writ by reason of any anticipated obstruction of the works of the Company, is insufficient in this, that it does not state otherwise than argumentatively, that the making of the accommodation works would obstruct the working of the line, but only that the works required by Falls would do so, without showing

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what works were required by Falls; and that it is not shown that the said works might have been made before the making of the return without causing any obstruction to the using of the Railway.

Joinder in demurrer.

*A. Vance*, with whom were *O'Hagan* and *Tomb*, for the demurrer.

The writ of mandamus issued on the 17th of January last, and is founded on the 8 & 9 Vic. c. 20, s. 68 (the Railways Clauses Consolidation Act, 1845), which enacts:—"The Company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the Railway (that is to say), such and so many convenient gates, bridges, arches, culverts and passages over, under or by the sides of or leading to or from the Railway, as shall be necessary for the purpose of making good any interruptions caused by the Railway to the use of the lands through which the Railway shall be made; and such works shall be made forthwith after the part of the Railway passing over such lands shall have been laid out or formed, or during the formation thereof, &c.: provided always, that the Company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the Railway; nor to make any accommodation works, with respect to which the owners and occupiers of the lands shall have agreed to receive, and shall have been paid compensation, instead of the making them."

The return is grounded on the 8 & 9 Vic. c. 18, s. 94 (the Lands Clauses Consolidation Act (1845), enacting that "If any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special Act, or any Act incorporated therewith, compellable to make; and if the owner of such lands have not other lands adjoining such piece of land, and require the

"promoters of the undertaking to make such communication, then  
 "the promoters of the undertaking may require such owner to sell  
 "to them such piece of land; and any dispute as to the value of  
 "such piece of land, or as to what would be the expense of making  
 "such communication, shall be ascertained as herein provided for  
 "cases of disputed compensation; and on the occasion of ascertain-  
 "ing the value of the land required to be taken for the purposes of  
 "the works, the jury or the arbitrators, as the case may be, shall, if  
 "required by either party, ascertain by their verdict or award the  
 "value of any such severed piece of land, and also what would be  
 "the expense of making such communication."

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The argument rests on these sections; it is apparent from the suggestions in the writ of mandamus, that the case is within that 68th section of 8 & 9 Vic. c. 20. We say we are justified in assuming that, for the Company should have traversed the suggestions in our writ, and that this return is bad, because it omits to negative the exceptions in the 93rd section of the Lands Clauses Consolidation Act (1845), and does not controvert a single allegation in the writ. That 93rd section is to this effect:—"If any lands, "not being situate in a town, or built upon, shall be so cut "through and divided by the works as to leave either on both sides "or on one side thereof a less quantity of land than half a statute "acre, and if the owner of such small parcel of land require the "promoters of the undertaking to purchase the same along with "the other land required for the purposes of the special Act, the "promoters of the undertaking shall purchase the same accordingly, "unless the owner thereof have other land adjoining to that so left "into which the same can be thrown, so as to be conveniently "occupied therewith; and if such owner have any other land so "adjoining, the promoters of the undertaking shall, if so required "by the owner, at their own expense, throw the piece of land "so left into such adjoining land, by removing the fences and "levelling the sites thereof, and by soiling the same in a suffi- "cient and workmanlike manner." The return should have negatived these qualifications. With respect to the description of land to which both the 93rd and 94th sections apply, it

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ought to have negatived the fact, that the land in question is land built upon, or traversed the suggestion in the writ, which shows it was land built upon: *Grand Junction Railway Company v. White* (a). Where a clause in an Act of Parliament furnishing a defence to an action of trespass contains a proviso or exception, the defendant should negative it in his plea; but where the proviso or exception is in another clause, in order to show the case to be within it, or the former clause not applicable, such matters should be replied.—[MOORE, J. But here the exception is in another clause.]—That makes no difference; for in *Vavasour v. Ormrod* (b) Lord Tenterden puts the case of an exception introduced into a clause, not in express terms, but by words of reference; and he says that in such a case the rule applies “*verba relata inesse videntur*,” and that the plaintiff must in pleading state the exception. This is land built upon, and the 93rd and 94th sections are inapplicable, inasmuch as these sections are confined to the case of a severance, where the part severed is so comparatively valueless as not to be worth the expense of a communication; and those sections were never intended to apply to the case of a severance, where the part severed was essential or convenient for the occupation of the residence. The Company do not deny that they have no right to cut us off from the sea; the piece of slob is comparatively of no importance, but by their embankment we are precluded the enjoyment of the sea.—[CRAMPTON, J. They concede you are entitled to consequential damage.]—Our argument is, that this right of access to the sea is not a case for compensation at all; whereas the value to be awarded under the section relied on by the Company is the value of the land. Suppose these premises consisted of a large house with a communication to the high road, would any Railway Company be authorised to shut the occupiers out from the road and deprive him of access to it? In no case can a Company deprive a person of reasonable accommodation works.—[BLACKBURN, C. J. The case of a high road stands on a very different footing from

(a) 8 Mees. & Wels. 214.

(b) 6 B. & C. 432.

this.]—We cannot use the land if cut off from the sea ; and to this state of facts the 94th section has no applicability.—[MOORE, J. Suppose the value of the communication with the sea was the drawing off manure, would not that be the subject of compensation ?]—But then accommodation works cannot be the subject of compensation.—[BLACKBURN, C. J. Every thing connected with this property is a subject of compensation.]—*Regina v. Hull and Selby Railway Company (a)*.—[MOORE, J. That decision was on a private Act of Parliament, and is nothing but the construction of a specific section of a specific Act of Parliament.]—But the lands in question are not within the 94th section ; we are cut off from the sea, and at Common Law we would have a right of communication with the sea, and we are not by these statutes deprived of that right.

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*Faloon*, with whom was *Gilmore*, in support of the return.

The Railways Clauses Act has no applicability here ; it is conversant with another and a different state of things. These several statutes, the Lands Clauses and Railways Clauses Acts, contain distinct headings to each class of enactments. Here there is no complaint that the lands are injured, but under the 8 & 9 Vic. c. 18, s. 49, there being a severance of the lands, the Company were bound to take the steps they did. That section enacts:—"Where such inquiry shall relate to the value of the lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which, under the provisions herein contained he is enabled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands, by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the

(a) 6 Mees. & Wels. 699.

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*"special Act, or any Act incorporated therewith."* The prosecutor admits, if this be a case of compensation, the Company have proceeded rightly, so that the question must turn on the 93rd & 94th sections of the Lands Clauses Act. The Company contend that with the 93rd section they have nothing to do; that section has reference solely to the owners of lands insisting on a sale when the lands are intersected; the present is a case of a compulsory purchase by the promoters of the undertaking under the several provisions of the statute; and the land intersected, leaving on one side of the works a piece of land of less value than the expense of making a communication, brings the case directly within the 94th section. We do not dispute the rule of pleading, that where an exception is incorporated in the body of the clause, he who pleads the clause ought also to plead the exception: *Jones v. Axen (a)*; and where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to the adversary to show the proviso. If therefore these were lands situate in a town or built upon, the prosecutor in his writ should have so averred, and the Company not relying on the 93rd section had no occasion to traverse it. But the writ of mandamus itself precludes the entertaining such an objection, for in the writ the property is thus described: "A piece or parcel of ground adjoining the said Railway, lying within the sea mark, and adjoining on the west on the road leading from Carrickfergus aforesaid, and on the east adjoining Belfast Lough, and situate in the townland of Greencastle, &c., and also in occupation of another piece or plot of ground, strand, or slob, adjoining the said Railway, &c., and running back to low-water mark in the Belfast Lough, &c.; and another piece or plot of ground, strand, or slob, adjoining the said Railway on the east side of the said road, &c., and running backwards to low-water mark in the Belfast Lough," &c.; so that the Court are called on, despite this description, to intend as against the return that the ground in question is situate in a town and built upon. The Court will not presume against a return: *Rex v. Lyme Regis (b)*; nor will they intend facts inconsistent with it for the purpose of making it bad:

(a) 1 Lord Ray. 120.

(b) Doug. 158.

*Manason's case* (a); *Rex v. Mayor of Abingdon* (b). The principle is well settled, that, if every part of a return be not good, yet if it state a sufficient reason to justify the party making it, that will be an answer: *Rex v. Archbishop of York* (c); *Rex v. Corporation of Dublin* (d).

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The heading to the 93rd and 94th sections is this:—"And with respect to small portions of intersected land, be it enacted as follows;" then follows the 93rd section, conversant solely with cases of owners of land intersected, insisting on sale, and requiring the promoters to purchase the severed portion; and the 94th section begins, "if any such land"—clearly referring to the general heading, and having no relationship to the 93rd section preceding. The construction that the prosecutor would put on these sections would lead to this, that if there were a number of small houses, through some of which the Railway passed, the Company would be bound to purchase the whole; or if it crossed a lawn, and a mansion-house were situate near it, the Company must purchase the mansion-house as well as the land over which the line of Railway crossed. It is to prevent so great a hardship that the qualification has been introduced into the section. Here the Railway Company have done every thing required by the Acts of Parliament; the notices to treat have been served; offers of compensation made; a jury summoned, and the default made by the prosecutor in not attending; then they call on two Justices to appoint a surveyor, who being nominated, made his award as to the value of the intersected land, and that land being of less value than the expense of making a communication; the Company pay the amount so assessed into the bank. We therefore submit the return is good, and that this writ must be quashed.

*Tomb* replied.

BLACKBURN, C. J.

In this case, Mr. Falls has applied for a writ of mandamus to

(a) Ray. R. 365.

(b) 2 Salk. 43.

(c) 6 T. R. 490.

(d) Batty R. 636.

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compel the Belfast and Ballymena Railway Company to make, or cause to be made, such convenient arch, tunnel or passage under the said Railway, as shall be necessary for the purpose of making good the interruption caused by the Railway to the use of the lands in his occupation, to enable him in fact to have access from these lands to the sea. The ground in question is in the neighbourhood of Belfast, and has been intersected by the Railroad, which has cut off from another portion of Mr. Falls's property slob, which is covered by the water at ordinary tides. On the prosecutor's part two objections are made, grounded on the return. The effect of that return is, that under the provisions of the Lands Clauses Consolidation Act (1845) the Company valued the cut-off portion of the lands in the mode prescribed by the statute for cases of disputed compensation; and that that valuation is trifling in amount, and not reaching even one-eighth part of the costs that would be incurred by making the works required. The return is demurred to upon two grounds—first, that property of this sort, which is an incidental right of enjoyment, is not properly the subject of compensation within the meaning of the Act; because, if there were not a communication with the sea, the property would be quite valueless; and it is likened to the case of a house cut off from the highway. What the case of a road may be, is by no means the question. A communication with the highway is essential to the very thing retained—namely, the house, and does not admit of compensation. But in the present case all the matters are not essential to the enjoyment of the property, and admit of compensation. Where the Company decline giving the accommodation works, on the ground of the expense of making the same exceeding the value of the land cut off, the party must receive the value in money. It is impossible to imagine any incident to property which is not the subject of compensation under that 49th section to which we were referred; and if a jury were empanelled to value this separated portion of Mr. Falls's property, they were bound to estimate the loss he sustained by reason of the severance, and to award him full compensation.

A second objection to the return was, that this was property built upon, and therefore came within the 93rd section of the Act

of Parliament; but I am satisfied this was not ground built upon within the meaning of that section, and that the words in the 94th section, "such land," have no reference to land in a town, or land built upon. They refer to the separated portion, and are to be construed by reference to the preamble to that 93rd section. That case from 6 *Mee. & Wels.* p. 699, does not bear on the present. There the Company were bound by their Act of Parliament to make a wharf; the prosecutor had already received compensation, and the only question before the Court was, whether that compensation had been made in a specific form?

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CRAMPTON, J.

I have some difficulty in arriving at the conclusion to which the Court have come; the Lands Clauses Consolidation Act and the Railway Clauses Consolidation Act passed on the same day, and the sole question is, is Mr. Falls entitled to the accommodation works he requires? By means of the property he held, he had at all times access to the sea, and the 8 *Vic. c. 20*, expressly prescribes the works that are to be made where portions of land belonging to the same owner are cut off. The difficulty I have is in considering the 94th section to apply, for I am by no means clear that the 49th section and the 94th section involve the same matters. The 94th section is applicable to cases where the severed portion of the lands is of little or no value, but here Falls is losing what in itself may be of little value, and yet the enjoyment of it may be of the utmost importance. Surely that is a case for a mandamus. How can the several matters referred to be the subject of valuation by a jury? Nothing is to be the subject of valuation except the things specified in the 49th section, and that does not allude to several of the matters set out in the writ; the jury are to take into consideration nothing in the nature of an easement. Although, therefore, I do not say I dissent from the opinion of the Court, I feel great difficulty in saying, that an easement like the present was one contemplated by the Legislature in passing that 94th section.

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I concur with my LORD CHIEF JUSTICE, although I am far from saying this is not a case admitting of doubt. It appears to me that the 93rd and 94th sections of the Lands Clauses Act provided for two distinct classes of cases; it being an evident hardship to intersect a man's land and leave but half an acre in his possession separated from his other land, the 93rd section accordingly empowers the owner to compel the Company to purchase that half acre; but then, on that half acre there might be houses of no value to the Company, and therefore the Legislature say, we will not allow the owner to force the Company to purchase these houses. Then the 94th section gives the Company a corresponding benefit; they have the option of purchasing or of making accommodation works. The one section by no means qualifies the other; the 94th section is not compulsory, and refers entirely to a question of quantity and value, giving the Company an option in the particular case referred to.

Demurrer overruled.\*

\* PERRIN, J., was absent.

1847.  
Easter Term.  
May 7.

Lessee KNOX v. GILDEA.

Where a tenant after the execution of an *habere* was allowed to remain in possession under the provisions of 9 & 10 Vic. c. 111, s. 8, the Court will not order the *habere* to be renewed without a previous demand of possession.

SKELTON applied for liberty to renew the *habere* in this cause, and grounded his motion on the Sheriff's return, and the affidavit of the land-agent of the lessor of the plaintiff, made under the statute 9 & 10 Vic. c. 111, s. 8, which provides "That it shall be lawful for the Sheriff, or his bailiff or officer, upon the consent in writing of the lessor of the plaintiff, or the plaintiff, or the attorney of the plaintiff, to execute any writ of *habere facias possessionem* in any

demand of possession.

"action of ejectment, or any civil bill decree for the recovery of the possession of lands and tenements, without removing therefrom, or disturbing the possession or occupation of, any under-tenant or occupier who shall, at the time of the execution of such writ or decree, sign with his or her name or mark, attested by such Sheriff or officer, an acknowledgment according to either of the forms, Nos. 1 and 2 in the schedule to this Act annexed," &c. We obtained judgment last November, the *habere* issued in January and the tenants were put into possession under the schedule No. 2 to that Act;\* we now wish to evict these tenants by a renewal of the *habere*.—[PERRIN, J. Have you required them to attorn?—No, they are but tenants at will; we executed the *habere* under that statute, and the tenants signed in the form given in schedule No. 2. The affidavit of the agent states that they signed that indorsement in that form on the back of the *habere*. The ejectment was for non-payment of rent, and the tenants are still in possession.—[PERRIN, J. Have you demanded possession?—We conceive it is not necessary.—[PERRIN, J. *Non constat* if you had, they would have yielded up possession.]—The statute is a remedial one; and it is an indulgence to the tenants allowing them to remain in.

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PERRIN, J.

Yes, but they may have cropped the ground in the meantime;

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\* The Schedule is as follows:—"Whereas A B, of, &c., hath lately recovered judgment in ejectment for the lands and tenements in the respective tenancy or occupation of the persons undernamed respectively, amongst other lands and tenements. Now, we whose names are hereunder subscribed, upon the execution of the writ of possession in the cause, according to the statute in that behalf, with the assent of A B, do hereby severally and respectively acknowledge that we respectively hold or occupy the lands and tenements now in our respective occupation as hereunder specified, by the leave and license, and for and on behalf of, and at the will of the said A B; and that we will severally and respectively, when required by the said A B, or his authorised agent or receiver, deliver up to the said A B, or his authorised agent or receiver, the possession of the said lands and premises in our respective occupation, as set opposite to our respective names in the schedule hereunder written: provided always, that if the said lands and premises shall in due course of law be redeemed in pursuance of the statutes in such case made and provided, these presents shall thenceforth be void." This schedule is signed by the tenant, and witnessed by the attorney for the plaintiff, and the Sheriff or Sheriff's officer.

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the Act intended to give the landlord his rights, doing as little injustice as might be to the tenants; and the tenant is allowed to remain, under a special agreement to deliver up possession if required; and if he refuse, then on application to the Court within six months he will be forced to comply; but it is not a mere form the applying to the Court; a case must be made for its interference; your affidavit does not state you required them to give up possession, and in that it is defective.

No rule.

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[PERRIN, J., sat alone when this application was made; but having consulted with BURTON, J., and CRAMPTON, J., they considered an application should have been made to the tenants to deliver up possession, or else a notice served on them of the intended application to the Court.]

On a subsequent day the application was renewed, on an affidavit of the demand of possession, and a conditional order was granted. This order was subsequently made absolute in Chamber; as otherwise, the six months in which the landlord was allowed to proceed under the Act would have elapsed, and the plaintiff would be thereby driven to bring a new ejectment. The order was made absolute on affidavit of service of the conditional order, and of demand of possession, with stay of execution until the 1st of November, on the ground that in the interval which had elapsed the tenant might have cropped the land.

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*Queen's Bench.*

M'CANN

v.

WILLIAM THOMSON, JOHN THOMSON and THOMAS  
THOMSON.

May 24.

FALCON applied on behalf of the plaintiff for liberty to substitute service of the *capias ad respondendum* in this case on one of the defendants, resident in this country, for the other two defendants, his co-partners; the action is brought against three defendants, brothers, co-partners in trade, on their acceptance of a bill of exchange; the debt is sworn to be a partnership one, and that two of the defendants are at present out of the jurisdiction, resident in Scotland. This is the proper mode of application when some of the joint defendants are not within the jurisdiction; and not to effect a service and then apply to have it deemed good: *Murphy v. Crewsdon (a)*; *McKenny v. Mark (b)*; there a conditional order was granted by Burton, J., under similar circumstances to the present.

This Court will not substitute service on a partner resident within the jurisdiction for his co-partner out of the jurisdiction, though the debt be sworn to be a partnership one.

*Per Curiam.\**

We have not gone so far as to grant an application of this nature; the plaintiff cannot be damnified by our refusing to substitute service, for if the defendant plead in abatement he must verify his plea, alleging that the other defendants are within the jurisdiction.

No rule.†

(a) 8 Ir. Law Rep. 161.

(b) 2 Ir. Law Rep. 161.

\* CRAMPTON, J., and PERRIN, J.

† THOMPSON v. HAUGHTON and another.

ROSS S. MOORE applied for an order to substitute service of the *capias ad respondendum* on one of the defendants for the other, who was sworn to be out of the jurisdiction. This was an action for a partnership debt; and in cases of partnership, the Court of Exchequer have frequently granted motions of this description.

MOORE, J.

I have conferred with the other Judges on this subject, and they are all of opinion that it is better to abide by the settled practice of this Court, and not allow the question to be re-argued. I must say—

No rule.

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1848.  
Nov. 24.

T. T. 1847.  
*Queen's Bench.*

LYDIA CARR v. FRANCIS DUNNE.

May 24, 27.

A being indebted to B in several sums of money, C the son of A enters into the following guarantee in a letter written by him to B: "At the request of my father, who informs me of your having proceeded on a certain judgment obtained by you against him, contracted by an advance made by you to W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof both my father and myself expect your demand will be paid and discharged: if, however, contrary to this expectation, there may be any disappointment in the payment of it, I hereby engage to pay or secure, in the event of my father dying before the demand can be satisfied, provided no further proceedings are carried forward or taken; and at the same time I have to inform you that my father and myself intend submitting, in a short time, an arrangement to his creditors, which we confidently hope will meet their wishes, and which, when submitted to you, I shall of course consider this letter of no effect."

This letter being objected to by B as an insufficient guarantee, the following letter was then written by C addressed to B:—"At the request of my father, who informs me of your having proceeded on a certain judgment obtained against him by you for an advance made to the late W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof we had hoped your claim would have been discharged. Should, however, my father's death take place before an offer can be made to you, together with other creditors, for the payment of both you and them, to the extent within my power to accomplish, and which I am making every exertion to effect as soon as possible, I shall consider myself bound to pay you such an amount, agreeable to your wishes of being secured against the casualty I have mentioned occurring before an arrangement could be offered, provided all proceedings cease."

The first three counts of a declaration, founded on the first of these letters, set out the consideration thus:—"That no further proceedings should be carried forward or taken by B against A on the judgment, and that B would give time to A in his lifetime for the payment of said sum of money; and the fourth count set forth a similar consideration on the latter of these letters. *Held*, that the letters did not sustain the declaration, the true meaning of the guarantee being, that all proceedings in the suit of R. H. F. should cease.

*Held also*, that the two letters did not constitute one guarantee, but that the one was a substitution for the other.

D. on his marriage in 1819, executed bonds to his trustees, payable at his death, and not in his lifetime, save at the option of his trustees. B having obtained a judgment against A, assigned it to D., who assigned this judgment over to his trustees as part payment of those bonds. D. then filed a charge on foot of this judgment in a cause then pending in the Court of Chancery, in the name of B, and in B's name instituted an action on the above guarantees.

*Held*, D. was an incompetent witness in such action, he being a person in whose immediate and individual behalf the action was brought.

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of obtaining payment thereof out of certain property whereof Edward Dunne was possessed; under the decree in which suit the plaintiff had, on the 3rd of December 1828, filed and proved a certain charge claiming the amount of the judgment and interest; and under which proof Edward Dunne and the defendant expected the amount of the judgment would be paid and discharged; and thereupon on the 3rd of August 1829, in consideration of the premises, and that no further proceedings should be carried forward or taken by the plaintiff against Edward Dunne on the said judgment, but on the contrary thereof that the plaintiff, at the special instance and request of the defendant, would forbear and give time to Edward Dunne during his lifetime for the payment of said sum of money, the defendant undertook and promised the plaintiff, that if the plaintiff should be disappointed in obtaining the payment thereof under the proceedings at the suit of Robert Henry French, to wit, the charge under the decree in said suit, and if Edward Dunne should die before the satisfaction of the demand of the plaintiff on foot of the judgment, the defendant would pay or secure to the plaintiff the sum of money so due to her by Edward Dunne. This count then averred that the plaintiff did not carry forward or take any further proceedings against Edward Dunne upon the judgment, and did forbear and give time to Edward Dunne for the payment of said sum of money during his lifetime; and further, that the plaintiff was disappointed in obtaining payment thereof under the proceedings at the suit of Robert Henry French, and that Edward Dunne died, leaving the demand of the plaintiff wholly unsatisfied. *Breach*, that although Edward Dunne in his lifetime, and after the plaintiff had been disappointed in obtaining of the money under the proceedings at the suit of Robert Henry French, was requested by the plaintiff to pay the said sum of money, he the said Edward Dunne did not pay the same, of which the defendant had notice, and that the said money still remained due, whereby, and soforth.

The second count stated the recovery of the judgment against the father of the defendant, the proceedings in the cause of *French v. Dunne*, and the consideration for the promise of the defendant

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as in the first count set forth, adding this further consideration, that if Edward Dunne and the defendant did not, in a short time thereafter, submit to the plaintiff and the other creditors of Edward Dunne an arrangement of the demand of the plaintiff on foot of the judgment, and of the respective debts of the other creditors of Edward Dunne, then the defendant would pay, &c. ; and averred in the breach the non-performance of this agreement in the terms thereof.

The third count was the same as the second, with the addition, that the defendant would submit to the plaintiff and the other creditors of Edward Dunne an arrangement which would meet the wishes of the plaintiff and the other creditors.

The fourth count set out the preliminary matters as in the first three counts, and then averred that the defendant, on the 13th of April 1830, represented to the plaintiff that he was making every exertion to effect, as soon as possible, payment of the said debt to the plaintiff, and their respective debts to the other creditors of Edward Dunne, to a certain extent so far as in his power to accomplish, and that the plaintiff was desirous of being secured against the casualty of the death of Edward Dunne taking place before an offer should be made to the plaintiff and the other creditors for such payment, and that the defendant declared that he was about to make such offer for payment ; and thereupon on the 13th of April 1830, in consideration of the premises, and that the plaintiff, at the special instance and request of the defendant, would cease all proceedings upon the said judgment against Edward Dunne, and forbear and give time to Edward Dunne during his lifetime for the payment thereof, the defendant promised the plaintiff to pay her the amount of the judgment, in the event of the death of Edward Dunne taking place before any offer for payment to the plaintiff, and to the other creditors, of their respective debts should be made. It then averred that the plaintiff did cease all proceedings against Edward Dunne, and did forbear and give time for the payment of the said sum of money during his lifetime, and that Edward Dunne died before any offer was made to the plaintiff and the other creditors for the payment of the judgment and the debts

of the other creditors. *Breach*, that no offer was ever made by Edward Dunne in his lifetime, or by the defendant in the lifetime of Edward Dunne, or since his death to the plaintiff, for the payment of the judgment or any part thereof, although Edward Dunne was requested so to do; and that Edward Dunne died leaving the judgment wholly unsatisfied, and that the same was still due, whereby, and soforth.

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To this declaration the defendant pleaded four pleas; first, *non assumpsit*; secondly, that the promises were promises to pay the debt of another and were not in writing; thirdly, the Statute of Limitations; fourthly, insolvency of the plaintiff, to which last plea the plaintiff replied that the original judgment was recovered by her as trustee for one Patrick Carr, and that she had not any beneficial interest in it. To this replication the defendant rejoined, traversing the allegation that the judgment was recovered by the plaintiff as a trustee, and that the plaintiff had not a beneficial interest in it.

At the trial it appeared that Edward Dunne, the father of the defendant, had given his bond to Lydia Carr the plaintiff, for a sum of £600 conditioned for the payment of certain bills. This bond bore date the 8th of April 1819, and judgment was entered on it at the suit of Lydia Carr. This judgment was assigned by her to Patrick Carr, who on the 12th of December 1828 assigned it over to Brabazon Browne, the trustee of Patrick Carr's marriage settlement, as part security for certain bonds which Patrick Carr had executed on his marriage for the sum of £2500, and which were made payable to his trustee at his death, and not in his lifetime, unless his trustee should think proper to enforce them. At the time this judgment was obtained against Edward Dunne, a suit was pending against him in the Court of Chancery, entitled *French v. Dunne*, and Lydia Carr filed a charge on foot of this judgment. During the proceedings in this cause a correspondence took place between Patrick Carr and the defendant in reference to this judgment; and on the 11th of November 1828 Patrick Carr wrote the following letter to the defendant:—

“In accordance with your suggestion, Mr. Hewson has filed his charge, but as there are so many claims before it, all of which

T. T. 1847. "must of course take precedence to same, the payment of the  
*Queen's Bench.* "latter I find very uncertain. Now as you have so frequently ex-  
 CARR "pressed a willingness to oblige me, may I beg of you to give me  
 v. "your bond in conjunction with your inheritor, with a declaration  
 DUNNE. "that if there should be funds by the sale of the lands mentioned  
 "in the decree in this cause, for payment of my demand, that the  
 "bond of General Dunne and his son should become a nullity and be  
 "given up. This is only a conditional security, of course, and which  
 "you in many of your letters have (and even in your last) sug-  
 "gested; I therefore send you a copy of the charge as filed, and  
 "although it is in the name of Lydia Carr it is merely on account  
 "of the bond being originally in her name; but she has since made  
 "me pay her, as it was at my instance and particular request  
 "that she accepted the original bills: therefore under all the circum-  
 "stances I trust you will let me have the conditional joint bond as  
 "soon as convenient."

In consequence of that application, Edward Dunne procured from his son the defendant the following letter addressed to Lydia Carr, which bore date the 3rd of August 1829:—

"At the request of my father General Dunne, who informs me  
 "of your having proceeded on a certain judgment obtained by you  
 "against him, contracted by an advance made by you to the late  
 "Mr. William Meredith, which judgment you have proved under  
 "the proceedings at the suit of Robert Henry French, and under  
 "which proof both my father and myself expect your demand will  
 "be paid and discharged: if, however, contrary to this expectation,  
 "there may be any disappointment in the payment of it, I hereby  
 "engage to pay or secure in the event of my father dying before  
 "the demand can be satisfied, *provided no further proceedings are*  
 "*carried forward or taken*; and at the same time I have to inform  
 "you that my father and myself intend submitting in a short time  
 "an arrangement to his creditors, which we confidently hope will  
 "meet their wishes, *and which, when submitted to you, I shall of*  
 "*course consider this letter of no effect.*

"Mrs. Lydia Carr, Dublin."

This letter not being considered satisfactory, a second letter was

written to Lydia Carr by the defendant, bearing date the 13th of April 1830, in the following words :—

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“At the request of my father General Dunne, who informs me of your having proceeded on a certain judgment obtained against him by you for an advance made to the late William Meredith, which judgment you have proved under the proceedings at the suit of R. H. French, and under which proof we had hoped your claim would have been discharged ; should, however, my father's death take place before an offer can be made to you, together with other creditors, for the payment of both you and them to the extent within my power to accomplish, and which I am making every exertion to effect as soon as possible, I shall consider myself bound to pay you such an amount, agreeable to your wishes of being secured against the casualty I have mentioned occurring before an arrangement could be offered, provided all proceedings ceased.”

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Patrick Carr was then offered as a witness. He was objected to by the Counsel for the defendant, on the ground that he was a person named in the record, and also that he was interested as a party, and for whom in part the action was brought. The witness was allowed to be examined subject to these objections.

He deposed that he was the son of Lydia Carr the plaintiff ; that the bond on which the judgment was entered was given to him by the plaintiff, and that he caused the securities to be taken for himself, and that John Hewson, who filed the charge, was the attorney ; and that his mother did not contribute to the costs of obtaining that judgment ; and that he on the 12th of December 1833 assigned it to his trustees ; that all the proceedings were carried on by him in the name of Lydia Carr ; that Edward Dunne never submitted an arrangement to him or to Lydia Carr on the subject of the guarantee. He also proved copies of letters bearing date October 1844, and 27th of November 1844, written by witness to the defendant, and that he posted them the day they were written ; that he never had received any thing in the cause of *French v. Dunne* on foot of the charge, and that that cause was then pending, but that no proceedings had been taken by him in it from the time the guarantee

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was given. On his cross-examination he deposed that he proved the charge in the cause of *French v. Dunne*, and that Hewson was the attorney; that Hewson was dead, and that previous to his death he gave witness the documents now in the possession of the plaintiff's attorney.

The plaintiff having closed her case, the defendant's Counsel called for a nonsuit, on the ground that the evidence did not prove the contract stated in any of the counts of the declaration; which the learned Judge refused.

The defendant then went into evidence, and proved that an arrangement had been proposed to the creditors of Edward Dunne, by which a certain portion of the rents of his estate was to be applied to the liquidation of their demand, and that the receiver was to be removed; but that that proposal was rejected. The decree in the cause of *French v. Dunne* was also given in evidence, and with this the defendant closed his case; whereupon the learned Judge told the jury that the construction of the letters, on which the plaintiff relied as contracts, being a question for the Court, he would send them the following issue, to enable the Court above finally to decide the question:—"Whether after the giving of the letter of the 3rd of August 1829, any proceeding was taken by the plaintiff, or on her behalf in her name, against General Dunne or his estate, either in the cause of *French v. Dunne* or otherwise, up to the time of General Dunne's death?" and the jury found in the negative. His Lordship then told the jury, that the proceedings contemplated by each of the letters, as those which were to cease, were proceedings on the part of the plaintiff Lydia Carr; and directed a verdict for the plaintiff, to be afterwards confined to such two counts of the declaration as the plaintiff should elect to rely on.

An order *nisi* having been obtained to set aside this verdict, and for a nonsuit, pursuant to leave reserved: or for a new trial, on the ground of misdirection and the admission of illegal evidence—

*Macdonogh* and *H. Smythe*, showed cause.

The first question is as to the competency of the witness Patrick Carr. That question depends upon the construction of the statute

6 & 7 Vic. c. 85, which enacts, that no person offered as a witness shall hereafter be excluded by reason of incapacity, from crime or interest, from giving evidence, provided that this Act shall not render competent any party to any suit, action or proceeding, individually named in the record, or any person in whose immediate and individual behalf any action may be brought or defended either wholly or in part. To render him incompetent, therefore, he must be either a party to the suit, or a person in whose immediate and individual behalf the action is brought. Patrick Carr comes within neither of those descriptions. His being named on the record does not make him a party to the suit. A *prochein amy* is named in the record, but he is not therefore a party to the suit, and is a competent witness: 1 *Starkie on Evidence*, p. 168. Lydia Carr was the only person competent to sue, and therefore Patrick Carr was not a party to the suit.

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Was the witness then a person in whose immediate and individual behalf the action was brought? To place him in that position the action must be one for his own individual and immediate benefit, and not a benefit to be attained mediately through another person or suit: *Wilson v. Magnay* (a); *Hearne v. Turner* (b); in that case, which was an action against a Sheriff for not arresting a debtor on a *ca. sa.*, the Sheriff's officer to whom the warrant had been granted was held a competent witness, although he might be made liable to the Sheriff in another action: *Wheeler v. Senior* (c). Here the only interest the witness could have was a resulting trust which might be enforced by a Court of Equity, but so very remote an interest as that does not come within the terms of the statute. He stands in the same position as the creditors of a bankrupt, who are admissible as witnesses in an action by the assignee: *Hart v. Stevens* (d); *Udal v. Walton* (e). To show that he had an interest lay on the party who alleged he had, and for that purpose he ought to have been examined on the *voire dire*; and supposing even that he

(a) 1 Car. & Kir. 291.

(b) 2 Com. B. 535.

(c) *Ibid*, 293.

(d) 23 Law Jour. 148, Q. B.

(e) 14 M. & W. 254.

T. T. 1847. had an interest, that appearing in the course of his examination *Queen's Bench.* would not invalidate his testimony: 1 *Phil. Evid.* 86. The Court have given the words of the statute a liberal construction, and the clear object of it is to raise a question of the credit of a witness, not a question of his competency: *Atkinson v. Foster* (a). But independent of that Act, Patrick Carr was competent: *Doe d. Teynham v. Tyler* (b).

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Then it is contended that the evidence did not prove the agreement alleged in the declaration, and that there was a variance; and it will be argued that, if these letters amount to a guarantee, they are but one contract and should have been declared on as such; but it is clear from their contents that they must be treated as separate and distinct contracts, and as such are properly declared on. It is next contended that, upon the true construction of the undertaking, it meant an agreement that all proceedings in the cause of *French v. Dunne* should cease; such could never have been in the contemplation of the parties, for it was expressly stated that the plaintiff's demand was to be satisfied out of the funds realised in that cause.

*Berwick and Battersby, contra.*

The intention of that statute, 6 & 7 Vic. c. 85, was to preclude a party directly interested from giving evidence; that interest must be the immediate and necessary consequence of the suit itself, such an interest as the lessor of the plaintiff in ejectment has. *Wilson v. Magnay* and *Wheeler v. Senior* were properly decided; for in those cases the witness had only an indirect interest, and no immediate benefit could accrue to him, and another suit would be necessary to make that interest available. Here the witness had an immediate and direct interest. Before the statute, any interest in the suit disqualified a witness; that is now altered; but the Act exempts from being competent witnesses any party to the suit individually named in the record: *Alexander v. Alexander* (c). The statute being a recent one, the decisions on it are few; but

(a) 1 Com. B. 712.

(b) 6 Bing. 391.

(c) 8 Jur.

we contend that on the words of the statute, Patrick Carr was incompetent. The judgment is in Patrick Carr, though he may not have the legal estate; and to hold him to be competent as a witness, is virtually to repeal the statute.

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Then as to the variance. The defendant is entitled to a nonsuit; the plain meaning and intention of these guarantees was, that all proceedings in the cause of *French v. Dunne* should cease; that was the advantage sought to be gained by entering into this guarantee; the mere cesser of proceedings on behalf of the plaintiff would be of no service to the parties, and could never have been the intention. Further, even supposing that was the intention of the parties, these two letters must be taken to form one independent contract; and being declared on as separate, and no count incorporating both, the plaintiff ought to have been nonsuited.

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BLACKBURN, C. J.

In this case two important questions have been discussed; first, whether Patrick Carr, who was examined at the trial, was a competent witness? The question of his competency depends on certain facts, which it is necessary should be understood.

This was a case of a contract by the defendant, as a surety, to pay the debt of his father, in consideration of the plaintiff forbearing to sue for a certain time, and for certain other considerations. It appears that Patrick Carr in 1819, on his marriage, executed bonds for £2500 to trustees payable at his death and not in his lifetime, unless the trustees should think proper to enforce the payment. He therefore in the first instance was the legal debtor to his own trustees for that sum. Lydia Carr had obtained a bond from the father of the defendant, which she had assigned to her son the said Patrick Carr, and he in her name had brought an action on this bond, and had obtained judgment thereon, and afterwards, in the cause of *French v. Dunne*, he, in the name of his mother, had proved this judgment by a charge filed in that cause; from that moment he had a distinct interest in all the proceedings in that

T. T. 1847. cause, and the same species of right as the party who comes in  
*Queen's Bench.* where his demand is admitted and proved.

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In that state of things the defendant comes forward and executes two instruments, one bearing date the 3rd of August 1829, and the other the 13th of April 1830, the object of both being the same, viz., a guarantee by the defendant for his father (the defendant in the cause of *French v. Dunne*). At the time Patrick Carr entered into this engagement, Lydia Carr had no interest in the judgment, she was merely a trustee for him who was the person beneficially interested. Patrick Carr in 1833 thought proper to use this judgment for this purpose:—Being indebted to the trustees of his marriage settlement by bonds not payable until his death, he assigned this judgment to them in part satisfaction of that legal debt, and by force of that assignment the benefit of that collateral security was transferred with the debt itself to the trustees of his settlement; so that they are now beneficially entitled to the interest in this judgment. Is Patrick Carr then not the person upon whose immediate and individual behalf this suit is instituted? It appears to me plain that he is immediately, individually and exclusively interested. Lydia Carr was to hand the debt over to the trustees when recovered, and thus £550 of the £2500 due to them by Patrick Carr would be liquidated, so that the whole benefit enures to him. We therefore are not narrowing the construction of the statute, or refusing to give it the operation its policy requires, that is, that all persons not immediately and directly interested should be allowed to give evidence. There is abundant evidence, not merely that he is the beneficial owner, but that he was the sole and exclusive promoter of this action. In 1827 and 1828, when the demand was proved, Hewson was employed as his solicitor, and he became as such the depository of every document relating to this demand, which so remained in his possession until 1835, when he handed them to Patrick Carr, who alone had an interest in them, and who retained them till the present proceedings were taken, and then gave them to the present attorney prosecuting this suit. But further, we find Patrick Carr writing the letter by which he claims the demand

as exclusively his own property, and then we have the letter of the 17th of April 1845, written by the attorney employed by Patrick Carr, to sue in the name of his trustees, and he is the witness who proves those letters. How then can it be said that he has not an immediate individual interest, when he is the sole mover and promoter of the action? It is plain that he is incompetent; that, however, will not entitle the defendant either to a verdict or a nonsuit.

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Then as to the other point, the Court are unanimous there should be a nonsuit. A creditor's suit had been instituted, and a receiver appointed in that suit over the entire estate of Edward Dunne, intercepting the rents. Edward Dunne was tenant for life, and his son then comes forward and enters into the contract declared on. From the nature of the case it is obvious that an arrangement with one creditor would not afford relief, and it is plain that in no instance did the family derive any benefit, the receiver being continued during the life of Edward Dunne; it is clear therefore that the proceedings never ceased; and if the condition of the contract was that they should cease, that condition has not been performed: and I must observe we are dealing with a surety who is only bound by his contract, and if he bound himself subject to a condition which has not been followed up, he is not liable in this action. Then it is contended they ought to have been declared on as one contract. Two contracts cannot co-exist to guarantee the same debt, one must be taken as substituted for the other: both contain a condition that the proceedings shall cease; and looking to the situation of the parties, it is plain that the ceasing of that cause was the inducement of the son to become bound for the debts of his father. The contract as declared on is, that all proceedings by Lydia Carr were to cease; but that is not the language of it, nor can it be so spelled out by construction. In the letter of the 3rd of August he says, "You are proceeding on a judgment you have proved under the proceedings at the suit of Robert Henry French, and under which proof both my father and myself expect your demand will be paid and discharged. If, however, contrary

T. T. 1847. "to this expectation, there may be any disappointment in the pay-  
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 DUNNE. "ment of it, I hereby engage to pay or secure, in the event of my  
 "father dying before the demand can be satisfied, provided no  
 "further proceedings are carried forward or taken." There the  
 proceedings are identified with French's suit, under the decree in  
 which cause all creditors were entitled to come in. What is the  
 meaning of "no further proceedings?" It must mean proceedings  
 by all the creditors, and is clearly distinguished from proceedings  
 by individual creditors. We cannot read the same words differ-  
 ently in different places, and deprive the guarantee of its only  
 rational and intelligible object. But read the contract of the 13th  
 of April, which, in my mind, is the only contract. There the  
 words are "provided all proceedings ceased;" there is no allusion  
 to the fund to be released, or the means of payment. We have  
 no right to limit a condition framed in terms most general, and  
 say that there shall be a partial cesser, and not as the party  
 himself says, a total cesser. I am therefore of opinion that this  
 guarantee has not been declared on according to its legal opera-  
 tion, and therefore a nonsuit must be entered.

BURTON, J., concurred.

CRAMPTON, J.

I concur in the judgment of the Court, and for the reasons given.

Two very important points have been raised in this case. The  
 first is, whether Patrick Carr was, or was not a competent witness?  
 What is the meaning of the expression, the party who has an imme-  
 diate individual interest in the action? It may be a matter of  
 some nicety to draw the line and state the extent of the interest,  
 but it is not necessary that I should do so. I will concede, for the  
 purpose of this discussion, that no interest will disqualify, unless  
 it be shown that the party is plaintiff in the action, or substan-  
 tially so. Taking that to be the law, although it is pressing the  
 matter too far, Patrick Carr is here the actor and paymaster of  
 the attorney who brought this action; and we have him in his

letter of 1827 stating that he alone is interested in the judgment, and that the charge was filed in the name of his mother, as the bond had been originally in her name. The present action is in the name of Lydia Carr, but it is confessedly not brought on her behalf; further, he says that his mother left every thing to him, and Hewson the solicitor gave all the papers to him; under these circumstances it is quite unnecessary that we should have recourse to the Act, for it is manifest that he alone brought the action.

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Then, it is said that two contracts are relied on. There may not be any material difference between them; but, except as a matter of evidence, the letter of 1829 is out of the case, for it was rejected, or rather objected to, by Patrick Carr; and then a new proposal is sent, which we ought to consider as substituted for the original one. Either it was substituted for the first, or we are to take both together; and the second modifies the first. If both are to be taken together, there is no count incorporating them, and in that case the real contract has not been declared on. I do not think that the true view, for I think the second is substituted for the first; and if that be so, there is clearly a variance between the evidence and the pleadings. The pleadings are, that the proceedings on foot of the judgment were to cease—that is, the proceedings at law; and the contract is, that all proceedings should cease. Now, it is clear that condition has reference to equity proceedings; it could not mean any thing else, because the entire of Edward Dunne's property was under a receiver, and any proceeding that could be taken in order to make the judgment effectual could only be through the medium of the equity cause. Under these circumstances, it is impossible not to see a complete variance between the declaration and the proof, therefore there must be a nonsuit.

PERRIN, J.

I concur in the judgment. Patrick Carr was an incompetent witness. If the amount of this judgment were paid, it went into his pocket; he therefore appears to me directly interested. I do not understand the meaning of the word "interest," if he the party

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receiving the money be not interested. He also was the conductor of the suit, and under these circumstances he comes clearly within the terms of the statute.

As to the other question. I understand the contract to be, that all proceedings should have ceased, by which the defendant and his father would have derived a substantial benefit; it is therefore plain that the agreement declared on is not the same as the agreement made; and therefore there must be a

Nonsuit.

COATES v. SHIELDS and Wife.

May 27.

Where an interlocutory judgment had been obtained against a *feme dum sola*, and before final judgment she marries, the proper course is to enter a suggestion, and there is no necessity to apply for a *scire facias* to revive the judgment.

COATES applied for liberty to issue a *scire facias* to revive a judgment against husband and wife. An interlocutory judgment had been obtained against the wife *dum sola*, and before final judgment was entered, she married, and the order sought was to enable the plaintiff to revive the judgment against both husband and wife. In *Cooper v. Hunchin* (a) Lord Ellenborough says: "The execution must follow the nature of the judgment. Whether the husband can bring error or not is another question. But the judgment here being against the *feme* only, the execution can only be against her. If the plaintiff had meant to implicate the husband in the consequences, he must have first made him a party by joining him in a *scire facias*."

CRAMPTON, J.\*

I think entering a suggestion would be your proper course; a *scire facias* is for execution, and in the writ you would require to recite the obtaining of a judgment of a particular kind, and that

(a) 4 East, 521.

\* *Solus*.

execution had not issued on it. There would be great difficulty in the manner of pleading, there being this interlocutory judgment against the wife *dum sola*. I will give a conditional order.

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*Queen's Bench.*  
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v.  
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*Coates* declined taking the order, and—

*Per Curiam*.—No rule.



THE QUEEN,  
At the Prosecution of WILLIAM GILDEA,  
v.  
THOMAS KELLY.

May 29.

In this case a conditional order had been obtained for liberty to file a criminal information against the defendant, for making use of and addressing certain insulting and offensive expressions to the prosecutor, with intent to provoke him to commit a breach of the peace by fighting a duel, unless cause, &c.

The affidavit to ground a criminal information for provoking a party to commit a breach of the peace by fighting a duel, should in all cases state that such was the intention of the party.

The affidavit of the prosecutor, on which this order was granted, stated very insulting and abusive language made use of by the defendant, who was an attorney, charging the prosecutor, who was a Clerk of the Peace, with misconduct, officially and otherwise. The affidavit contained no allegation that this language was made use of with the intention to provoke the prosecutor to commit a breach of the peace by fighting a duel.

*R. Holmes* and *W. Bourke* showed cause against the order, and contended that it ought not to be made absolute, in consequence of

T. T. 1847. the omission of this statement, and cited *Rex v. Byrne* (a); *Regina Queen's Bench. v. Maunsell* (b).

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*Reeves and Napier*, in support of the order.

That is not a general rule binding in all cases, and ought not to be enforced in the present case, where the prosecutor is a public officer, charged with misconduct in reference to his office, and that charge made by an attorney, an officer of this Court.—[CRAMPTON, J. It would be impossible, however, to make the present order absolute, for this order was obtained for provoking the prosecutor to commit a breach of the peace by fighting a duel.]—That part of the order may be disregarded. In England the Court would be coerced to make this order: *Ex parte Duke of Marlborough* (c); *Regina v. Langley* (d); *Rex v. Pocock* (e); *Regina v. Gwilt* (f); *Ex parte Chapman* (g).

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BLACKBURN, C. J.

May 31.

In this case a conditional order was obtained by the prosecutor for leave to file a criminal information against the defendant, one of the attorneys of this Court, for using language with the intention to provoke him to fight a duel. The practice of this Court, in cases where that intention is the offence to be prosecuted, requires to have it stated by affidavit that such was the intention; and if it was necessary to support that practice by recurring to the reason of it, I should say that it is highly just, necessary and reasonable that the prosecutor should, by affidavit (which is the foundation and ground for withdrawing the case from the ordinary tribunal, the Grand Jury), assure the Court that the very offence which he imputes has been in fact committed; if he does not, he takes an order to prosecute for a particular offence which the affidavits used by him do

(a) 1 H. & Br. 16.

(c) 5 A. & E. N. S. 967.

(e) 2 Stra. 1167.

(b) 1 Ir. Law Rep. 267.

(d) 2 Salk. 698.

(f) 11 A. & E. 587.

(g) 4 A. & E. 773.

not show to have been committed. I shall only add, that in adhering to and acting on this rule, we neither narrow the jurisdiction of this Court, nor question the authorities which show that it extends to cases of assault and provocation to commit a breach of the peace.

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KELLY.

Cause allowed.

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v.

THE GREAT SOUTHERN AND WESTERN RAILWAY  
COMPANY.

And in the Matter of 7 & 8 Vic. c. 100.

May 31.

A CONDITIONAL order had been obtained that a mandamus do issue directed to the Great Southern and Western Railway Company, commanding them, pursuant to the provisions of the Act passed in the eighth year of the reign of her present Majesty, entitled, "An Act for making and maintaining a Railway from the city of Dublin to the town of Cashel, with a branch to the town of Carlow," to set out and purchase all lands necessary to make and complete that portion of their Railway from Dublin to Cashel, which lies between a certain field near the town of Thurles, in the county of Tipperary, and the proposed terminus thereof in a field near Cashel in said county, and to take all necessary proceedings so as to have all such land purchased, taken or agreed for before the 6th day of August next, pursuant to the powers and provisions in the

Where a Railway Company had obtained an Act of Parliament for the formation of a line of Railway, the compulsory powers in which were to be exercised within three years from its passing, and the line to be formed according to the course delineated in the plans, and where they afterwards obtained an Extension Act containing no clauses dis-

pensing with the Company's obligation to form the line: *Held*, that a mandamus to the Company commanding them to set out and purchase all lands necessary to make and complete a portion of their Railway, and to take all necessary proceedings so as to have all such land purchased, would not be granted on the application of a private individual through whose lands a portion of the Railway was to run; such applicant not appearing to represent the public in any capacity, nor resting his application on other than private grounds.

T. T. 1847. said Act contained, unless cause to the contrary be shown within ten  
*Queen's Bench.* days after service of this order upon the Company.

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The affidavit of William Murphy (who was the owner in fee of certain land specified in the affidavit) stated that, by a certain Act of Parliament thereafter called the original Act, made and passed in the eighth year of the reign of her present Majesty Queen Victoria, entitled, "An Act for making and maintaining a Railway from the "city of Dublin to the town of Cashel, with a branch to the town "of Carlow;" and which Act received the royal assent and was passed on the 6th day of August 1844; after reciting that the construction of a Railway from the city of Dublin to the town of Cashel, in the county of Tipperary, with a branch from or near Monasterevan to the town of Carlow, in the county of Carlow, would be of great public advantage, by expediting and facilitating the communication between Dublin and other important towns in Ireland, and that the several persons therein named, with other persons and co-partners were willing, at their expense, to carry the said undertaking into execution, but that the same could not be effected without the authority of Parliament: it was, amongst other things, enacted that certain persons therein named, and all other persons and co-partners who had subscribed, or should thereafter subscribe towards the said undertaking, and their several successors, executors, administrators or assigns, should be, and they were thereby united into a Company for making and maintaining the said Railway and other works by the said Act authorised, and for other the purposes therein declared, according to the provisions of the said Act, and for that purpose should be incorporated by the name of "The Great Southern and Western Railway Company," and by that name should be a body corporate with perpetual succession, and should have power to purchase and hold lands for the purposes of the said undertaking, within the restrictions therein contained; that it was thereby enacted that the capital of the Company should be £1,300,000, and that they might borrow £433,300 when the half of the capital was paid up; that the money was to be applied to the payment of the costs of the Act, and to carry its purposes into execution; that when they required land they were to serve notices

to treat on all the parties interested, and if after one month from the service of such notice, such party should fail to set out the particulars of his estate, or would not agree with the Company as to terms, then the difference was to be settled in the manner therein provided for cases of disputed compensation; that certain powers in said Act set forth were given to the said Company, enabling them to purchase all lands required for the Railway, either by private agreement or by means of a jury, and fourteen days' notice was to be given of any inquiry before a jury; that the compulsory powers for the purchase of lands were to cease at the end of three years from the passing of the Act; that the whole capital was to be subscribed before any such powers should be put in force; that the Company were to make the Railway according to the line and course delineated in the plans and books of reference; that it should commence in a field near the King's bridge in the county of the city of Dublin, and was to pass through Thurles, Holy Cross, Tertiana Gaile, Ardmayle, Ballysheehan, Saint Patrick's Rock, Saint John the Baptist, and Hore Abbey, in the county of Tipperary, and would terminate at a point in a field near Cashel, at the North side of the road from Cashel to Golden, in the parish of Hore Abbey in said county of Tipperary; that the branch line was to follow the course therein also specified; that the maps and plans were lodged; that there was a power given to levy tolls; that in schedule K to the Act certain particulars were given of the lands; that the whole sum of £1,300,000 had been subscribed, and was sufficient for all the purposes of this Act; that parliamentary notices were served by the promoters of the Company, of their intention to apply for an Act for making a Railway from Dublin to Cashel, and that certain land mentioned in the annexed schedule would be required and passed through, and that plans would be deposited, and requiring the persons interested to express their assent or dissent before the 13th of May 1844, in respect to the undertaking.

The affidavit further stated that the prospectus of the Company was extensively circulated, and also the report of the engineer; that by the parliamentary contract or subscribers' agreement, certain

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**T. T. 1847.** persons agreed with each other to pay the sums opposite their names, for constructing the Railway; that the Company proceeded to purchase the land, and that the branch line to Carlow was completed; that all the land was purchased up to a field near Thurles, a distance of about ninety miles; that no part of the land between Cashel and Thurles had been purchased or agreed for, nor any preliminary proceedings taken towards purchasing the same.

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**COMPANY.**

It further stated that by the 9 Vic. c. 125 (called the Extension Act), and entitled "An Act to authorise the extension of the "Great Southern and Western Railway to the city of Cork, with "a Branch Railway to the city of Limerick," which received the royal assent on the 21st of July 1845, after reciting the original Act, it was enacted that all the provisions contained in the original Act (except as repealed by the Extension Act) should be applied to the Extension Act, and that the Lands Clauses Consolidation Act (1845), and the Railways Clauses Consolidation Act (1845), should be incorporated therewith; that the works by the Extension Act authorised should be consolidated with, and form part of the original undertaking; that the estimated expenses are £1,200,000, with power to borrow £400,000; that the course of the Railway was beginning at a field near the town of Thurles, and after going through several parishes to end in a piece of waste ground near the junction of the New Mallow and Old Cork and Dublin roads in the county of Cork; that there was no clause in the Extension Act to dispense with the Company's obligation to complete the Dublin and Cashel Railway, or authorising them to divert the sums of £1,300,000 or £433,300 from the original undertaking; that the Extension prospectus was circulated, and gave no intimation of an intention to leave incomplete a part of the original Railway; that the entire £2,500,000 have been subscribed for, and £1,375,000 paid up, and large sums are about to be borrowed by the Company; that the £2,500,000 would be sufficient for the purpose of the Act, and that the other sums of £433,300 and £400,000 were more than sufficient for the purposes of the Act; that the Company had derived a large income from the branch to Carlow; that they held inquisitions for the land up to Thurles, but not from

Thurles to Cashel, but had held them from Thurles to Kyle, in the Extension Act mentioned; that they had purchased the entire of the land to Cork; that they had contracted for the earth-work and had applied a part of the original funds to the Extension works; that the Company intended not to complete the Railway from Thurles to Cashel, but to allow the Act to expire; that several applications had been made by persons interested to the Company to have the Railway completed to Cashel, but no satisfactory answer given; and deponent being anxious, on public grounds as well as private, that it should be finished, directed his attorney to address a letter to the Company, which he did on the 29th of December 1846, requiring to know if they so intended; and that the Secretary of the Company replied thereto that the Company would give no pledge on the subject. The affidavit further stated that the line to Cork did not include any part of the Dublin and Cashel Railway between the said field near Thurles and the terminus at Cashel; and that the line to Cork could be completed before August next; that the Directors did not intend to complete the Railway, but intended to abandon that part between the field at Thurles and the terminus at Cashel; that the shareholders, subscribers and landholders assented, on the faith of the completion of the undertaking, and that great public and private injury would result if not completed; that since the obtaining the said Acts, another Company, called the Clonmel and Thurles Railway Company, had obtained an Act for completing a Railway communication between the town of Clonmel and the Great Southern and Western Railway Company at or near the town of Thurles, such line to begin at the terminus near Cashel to a point of communication near Clonmel joining the Limerick and Waterford Railway; that such Clonmel and Thurles Act was obtained on the understanding that the Southern and Western would be finished to the said terminus thereof; that deponent lives in Cashel, and has considerable property there in the immediate neighbourhood of the terminus, a part of which was necessary for the said terminus; and that unless deponent got an absolute mandamus against the Company, any writ of mandamus would be useless, by

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T. T. 1847. reason of the expiration of the period of three years from the passing  
*Queen's Bench.* of the original Act before it could be acted on.

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The affidavit of Croker Barrington, the solicitor for the Company, filed as cause against the conditional order, admitted most of the allegations in the prosecutor's affidavit; but stated that the sufficiency of the sum subscribed would depend on the result; that it was the intention of the Directors to make a Railway to Cashel by a different route, but one that would afford substantially the same benefits to persons residing at Cashel as the original line; and that it was for the prosecutor's private advantage he sought the remedy against the Company. It set forth various reasons for not completing the line between Thurles and Cashel, but denied that the Company had abandoned that intention.

The rule *nisi* had been obtained on the authority of *Regina v. Eastern Counties Railway Company (a)*.

*Brewster*, with whom was *Scully*, moved to make absolute the rule.

The plaintiff is entitled to have this order made absolute. The Act incorporating this Company is 7 & 8 Vic. c. 100, and the 62nd section provides that the capital is to be applied in carrying the purposes of the Company into execution, these purposes being the completion of the Railway to Cashel; and the 167th, 168th and 169th sections provide the means by which the purchase of land necessary for the Railway is to be carried out, and make it compulsory on the owners of the land to treat for the sale of it; and by the 221st section, this compulsory power is confined to three years from the passing of the Act, which will expire on the 6th of August 1847. The principle of the Court in such cases is to compel parties who enter into bargains to execute them, and private Acts of Parliament are bargains with the public: *Blakemore v. The Glamorganshire Canal Navigation (b)*. The words of Lord Eldon there are directly

(a) 1 Rail. Cas. 509; S. C. 10 Ad. & El. 531; S. C. 2 Rail. Cas. 260.

(b) 1 My. & K. 162.

applicable to the present case. He states :—"I regard them (private Acts of Parliament) all in the light of contracts made by the Legislature on behalf of every person interested in any thing to be done under them ; and I have no hesitation in asserting, that unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than any thing in the whole system of administration under our constitution. Such Acts have now become numerous, and from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the Legislature empower and compel them to do, and that they shall do nothing else ; that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." This Company having obtained the sanction of the Legislature to their proceedings, have no right to say they will only do what is beneficial to themselves ; and the Court are bound to grant a mandamus, it being the most effectual mode of compelling this Company to do their duty : *Rex v. The Severn and Wye Railway Company (a)* ; *Rex v. The Inhabitants of Cumberworth (b)* ; *Rex v. The Inhabitants of Edge Lane (c)* ; *Rex v. The Eastern Counties Railway*. In that case the Court granted a mandamus to the Company to proceed with the whole line and to purchase the necessary lands, it appearing to the Court that there were reasonable grounds for believing that the Company intended to complete a portion only of the line and to abandon the rest, although the Company stated they had not funds sufficient to complete the line. In this case it must be taken the Company have sufficient funds and are misapplying them ; and it is only necessary for us to show that there are grounds for inquiry.—[CRAMPTON, J. Do you represent the public?]—It is enough to show the public are interested : *Rex v. The Steward of Havering (d)* ; *Rex v. Mayor*

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(a) 2 B. & Al. 651.

(b) 3 B. & Ad. 103.

(c) 4 A. & E. 729.

(d) 5 B. & Al. 691.

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*of Hastings (a).*—[BLACKBURN, C. J. Have you an interest sufficient to sustain a mandamus, or would you say that any person in the community may apply for a mandamus on behalf of the public?—It is certainly for the public that the right exists; but we do not conceive it necessary to maintain that position; our case is like that of a turnpike road, the trustees of which are compellable to complete it and keep it in repair. Will the Court refuse this application because Murphy is a private individual? He has a deep interest in the Railway, and the Company are bound to complete it. He is made a party in it by the Company having served a notice on him previous to their obtaining their Act of Parliament.—[CRAMPTON, J. The difficulty arises from the character of the applicant, the mandamus being sought for either on the ground of his being a party to the contract or of his being a landowner within the original boundaries of the line. Can you show an authority where a mere informer alleging a breach of duty on the part of a public body applied on behalf of the public for a mandamus and obtained it?—Every one who has an interest in the completion of this Railway is one of the public, and in private Acts of Parliament the word “shall” is to be held to be compulsory.

*Fitzgibbon and J. Wall, contra.*

The case of *The Queen v. The Eastern Counties Railway Company* was one where the Act of Parliament obliged the Company to make a Railway from London to Yarmouth, and the question that was raised was, whether there had been substantial fraud practised on the public by the deviation from the original plan? Lord Denman there says:—“If it had appeared that the Company were substantially complying with the terms of their undertaking, there would have been at once a satisfactory answer to the application” (*b*). There the Company had failed to perform their contract with the public; here the Company did not contemplate running further than Cashel, and then they obtain another Act for a Railway to Cork. Yet the Court are called

(a) 1 D. & Ry. 148.

(b) 1 Rail. C. 519.

on to compel the Company to expend £60,000 in making a line to Thurles which would be totally useless. Besides there is no public injury done here, nor is there a contract with Murphy such as to enable him to apply for a mandamus; and if it be that every one in the community may apply for a writ of mandamus, paupers may seek it and saddle the Company with costs. It is for Murphy's personal advantage this application is made, that is apparent; and further, even if Murphy had the right to apply, he is at least premature, for he has shown no refusal on the part of the Company to complete this Railway: *The King v. The Bank of England* (a). Bailey J., says:—"The Court never grant this writ except for public purposes, and to compel the performance of public duties."

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*Scully* replied.

The application is made on public as well as on private grounds. Murphy has as great an interest in the completion of the line as any of the public; and because he has also a private interest, that does not interfere with his public right. If the mandamus be refused, there is no remedy; we can state our interest in the writ, and the Company may deny it if they can. If there be any uncertainty as to the right, the Court will allow the mandamus to issue: *New v. Milner* (b); *The Queen v. The Birmingham and Gloucester Railway Company* (c).

BLACKBURN, C. J.

In this case a conditional order for a mandamus is sought to be made absolute, directed to the Great Southern and Western Railway Company, the terms of which order I shall presently advert to.

It appears that the powers vested in the Company to do what they are now required to do, will expire on the 4th of August next, and the conditional order was not applied for until the 23rd of April; it is plain, therefore, that if this application were to be

(a) 2 B. & Ald. 622.

(b) 2 Y. & Col. 618.

(c) 2 Ad. & El. N. S. 47.

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granted, no return could be made until that time had elapsed; a peremptory mandamus in such a case would therefore be idle and inoperative.

But let us see what the object of the plaintiff is. He does not come here as a member of the Company, or as an inhabitant of Cashel, but in his own individual capacity, which is apparent from the terms of the conditional order. When the application was made for the conditional order before my Brother CRAMPTON, that case of *The Eastern Counties Railway Company* was cited, and he felt there might be a ground for some order, and he accordingly directed the Counsel who made the application to frame his own order; but that order has been framed in such a way as to exclude the applicability of that authority to the present case. It is a conditional order that a writ of mandamus do issue, to be directed to the Great Southern and Western Railway Company, commanding them, pursuant to the provisions of an Act passed in the 7 & 8 Vic., entitled "An Act for making and maintaining a Railway from the city of Dublin to the town of Cashel, with a Branch to the town of Carlow," to set out and purchase all lands necessary to make and complete that portion of their Railway from Dublin to Cashel, which lies between a certain field near the town of Thurles in the county of Tipperary, and the proposed terminus thereof in a field near Cashel; and to take all necessary proceedings so as to have all such land purchased, taken or agreed for before the 6th of August, pursuant to the powers of said Act, unless cause shown.

We are called upon to make absolute this order so obtained by Murphy, to enable him to have his land sold to the Company, and that they may pay him for it; that is all that will be accomplished by granting a mandamus. If the Company buy the applicant's land, they then may, or may not, make the Railway, as they please. It appears never to have entered into the prosecutor's contemplation to put forward the proper ground on which the application might be rested, that ground in which the public are peculiarly interested, viz., the making of the Railway; and he comes here, not, as I have before said, in any public capacity, but simply resting his case on private and personal grounds.

But it is said that this application ought to be granted, on the authority of that case in *Adolphus & Ellis*: it will be found on reference to that case that Symonds, on whose behalf the application was there made, had consented to the enlargement of the Company's powers on the faith that the line would be set out and defined, and that the parts of his property required for the Railway would be paid for within the enlarged time. There too there were affidavits by other parties, proprietors, and it is also plain that Symonds must have been a member of the Company, and the order in that case directed the Company to proceed to make and complete the Railway according to the provisions of the Act, and especially to set out and define the line of said Railway, and to proceed and purchase the lands necessary to the making and completing the said Railway. That was the principal object of the mandamus, the making and completing of the Railway, and the direction given to purchase the land was merely ancillary to that object; but here the applicant has left out of the case the precise ground for the jurisdiction which the Court exercised in that case, and has not shown any interest entitling him to this mandamus, and therefore this motion must be refused, with costs.

Cause allowed, with costs.

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MALCOMSON Brothers v. MORTON.

June 1, 4.

A declaration averred a bargain and sale of Indian corn, as per sample, at the rate of £12. 15s. per ton, and alleged as breach the non-delivery of the corn. At the trial this question was put to a witness, "whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn as distinguished from its condition?"

ABSUMPSIT for the non-delivery of a cargo of Indian corn. The declaration contained nine counts. The first count averred, that on the 23rd of November 1846, to wit, at Tramore in the county of Waterford, the plaintiffs, at the special instance and request of the defendant, bargained with the defendant to buy of the defendant, and the defendant then and there sold to the plaintiffs, a large quantity of goods, to wit, the cargo of the ship or vessel "Science" from Smyrna, laden with Indian corn, containing about 1250 quarters of Indian corn, as per a certain sample thereof, at the rate or price of

*Held*, that this was not a legal question, and was properly objected to, because the words "as per sample" in the contract are unambiguous, and no usage of trade can be admitted to vary or contradict the plain terms of a contract.

A bill of exceptions stating merely what the Judge refused to do is improperly framed, and should contain a statement of what his charge was, and wherein it was objectionable.

An exception stating that a direction was called for, "that the plaintiffs repudiated a contract by refusing to accept a cargo," is asking for a direction to the jury on a matter of fact, and therefore untenable.

Where the contract was an entire contract "for the cargo of the ship S.," and a direction was called for, "that if the jury believed the plaintiffs refused to take that cargo, they should find for the defendant," and the exception only set out that the Judge refused so to direct—

*Held*, that such exception should have specified how the Judge did direct the jury.

*Held also*, that a contract for "the cargo of the ship S.," is not a contract for the specific cargo of the S., and does not stand on the same footing as a contract for the sale of a specific chattel; such words imply a sale of the cargo, if it answer the description given by the purchaser.

*Semble*.—If a party purchases an article, whether specific or not, the value of which is fluctuating and uncertain, on a stipulation that it is of a certain quality, he is at liberty to reject it if it does not agree with the description, and sue for the value which it would have borne if it answered the description.

On a contract founded on this note: "Sold Messrs. M., & Co., per Mr. C. C., the cargo of the Science from Smyrna, say about 1250 quarters of Indian corn, as per sample, at £12. 15s. per ton, payment cash, less one-half per cent., to be taken from alongside the vessel, free of charge except weighing and measuring;" and these words were added by the agent of the plaintiffs: "I agree to send boats alongside as soon as I hear of the vessel being ready to discharge"—

*Held*, that such words so added did not imply a condition, the performance of which it was necessary to aver in the declaration.

£12. 15s. for each and every ton thereof, to be paid for in cash, less one-half per cent., to be taken from alongside, free of charges except for weighing and measuring, and to be delivered by the defendant to the plaintiffs upon the arrival of the ship or vessel "Science" from Smyrna at the port of Waterford, to wit, at, &c.; and in consideration thereof, and that the plaintiffs, at the like special instance and request of the defendant, had then and there undertaken and faithfully promised to the defendant to accept and receive the Indian corn, and to pay him for the same at the rate or price aforesaid, and according to the terms aforesaid, the defendant undertook and then and there faithfully promised the plaintiffs to deliver the Indian corn upon the arrival of the ship or vessel "Science" from Smyrna at the port of Waterford, to wit, at, &c., on, &c.; and although the plaintiffs, on the arrival of the ship or vessel "Science" from Smyrna at the port of Waterford, to wit, on, &c., at, &c., did request of the defendant to deliver to them the Indian corn, and the plaintiffs had always been ready and willing to accept and receive the same and pay him for the same at the rate and price and according to the terms aforesaid, whereof the defendant had notice. *Breach*, that the defendant would not, upon the arrival of the ship or vessel "Science" from Smyrna at the port of Waterford, or at any time afterwards, deliver the Indian corn, or any part thereof to the plaintiffs, although the ship "Science" had long since arrived at the port of Waterford from Smyrna, whereby, &c.

The second count stated the contract as in the first count, adding that the sample was shown by the defendant, and averring the cargo was to be delivered on request. *Breach*, the non-delivery on request.

The third count averred an agreement to deliver the cargo within a reasonable time from the date of the sale.

The fourth count averred that the plaintiffs had bought the cargo which the defendant promised to deliver on demand.

The fifth count stated a bargain and sale of Indian corn to be delivered upon the arrival of the ship "Science" from Smyrna at the port of Waterford.

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The sixth count differed from the fifth in stating that the Indian corn was to be delivered within a reasonable time.

The seventh count omitted the averment of a sale by sample, and alleged that the corn was to be delivered on request.

The eighth count stated generally the bargain and sale of a cargo of Indian corn to be delivered within a reasonable time.

The ninth differed from the eighth by averring that the delivery was to be on demand.

*Plea—Non-assumpsit.*

At the trial of the case at the Spring Assizes of 1847, for the county of Waterford, before the LORD CHIEF JUSTICE, the plaintiffs, in proof of their case, produced Christopher Cole, who deposed that he knew the defendant, and that he, acting on the part of the plaintiffs, bought for them a cargo of Indian corn, and that bought and sold notes were made on the sale, and he proved the following sold note:—

“Sold Messrs. Malcomson, Brothers, of Clonmel, per Mr. Cole, “the cargo of the ‘Science’ from Smyrna, say about 1250 quarters “of Indian corn as per sample, at £12. 15s. per ton, payment cash, “less one-half per cent., to be taken from alongside the vessel free “of charge except for weighing and measuring.—C. S. MORTON.

“Waterford, 23rd November, 1846.”

He further deposed, that on the 23rd of November 1846, a sample of Indian corn from the ship “Science” was produced to him by the defendant, and that he approved of the sample, but that it smelled of tar; and that defendant then stated that arose from the sample being taken from the top of the cargo, and that it would be found that the rest of the cargo was free from it; that the defendant further stated that the ship “Science” was at Cove, but had received orders to come round to Waterford. This witness further proved that the “Science” arrived in Waterford on the 26th of November, and that he went on board on the behalf of the plaintiffs and found the cargo damaged; that about twenty or thirty sacks were removed from the bulk; that the defendant was not then on board, but that he afterwards saw the defendant at his office; and that he stated to defendant the corn was not equal to sample; that defendant stated

he considered the remainder except those twenty or thirty sacks to be equal to the sample. Witness further deposed that the top of the cargo was much damaged, and that the rest of the cargo was worse than the sample, the whole of it being more or less injured from heating; that he told the defendant to remove more of the corn from the bulk, and that he (witness) would take for the plaintiffs the rest of the cargo if equal to sample; that the defendant did then remove more of the corn from the top of the cargo, but that he (witness) still objected to take for the plaintiffs the corn then uncovered till he should come to a part of the cargo which should be equal to sample; that the defendant then said to witness that the remainder of the cargo was equal to sample; and that witness should either take it or reject it, to which the witness replied that he should write to the plaintiffs, who were his principals; that he did then write to the plaintiffs, who were at Clonmel; and that the plaintiffs Robert Malcomson and Joseph Malcomson came to Waterford on the next day and went along with him on board the ship, and examined the cargo and found that about a foot down or more of the cargo had been removed from the fore-hold of the ship, and what remained in the fore-hold was so nearly equal to sample that the said Robert and Joseph were satisfied to take what so remained; and that witness was then instructed on behalf of the plaintiffs to take so much of the cargo; he further deposed that the part of the cargo which was in the main-hold of the ship was in a damaged state and not equal to sample; that he had soon afterwards an interview with the defendant, and then offered on behalf of the plaintiffs to take so much of the cargo as was equal to sample; and that if the plaintiffs and the defendant could not agree about the remainder, it should be left to arbitration, which the defendant declined. That he afterwards wrote a letter on behalf of the plaintiffs to the defendant, containing a similar offer, which was in the words and figures following:—

“ Mr. C. S. Morton, Waterford.      Waterford, twenty-eighth November 1846.

“ DEAR SIR—With reference to the cargo of Indian corn, *ex* “Science,” which I bought from you for account of Messrs. Malcomson, Brothers, they now instruct me to repeat in writing

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"what I proposed to you verbally, viz., I will take out of the forehold and what other part may appear unobjectionable; and as regards the remainder of the cargo, should we not agree about it they are willing to leave the matter to arbitration.

"C. B. COLE."

The witness also proved and read on behalf of the plaintiffs a letter from defendant as follows:—

"For C. B. Cole, Waterford, November 30th 1846.

"DEAR SIR—I received your note of the 28th instant, and the proposition you make therein on the part of Messrs. Malcomson, Brothers, with reference to the Indian corn, per 'Science,' I must beg to decline. (Signed) "C. S. MORTON."

And the reply thereto:—

"Mr. C. S. Morton, Waterford.

Waterford, 30th November 1846.

"DEAR SIR—I have your letter of this date, declining my proposal on behalf of Messrs. Malcomson, Brothers. I am now instructed by them to call on you to join issue in a survey on this cargo, to ascertain how far it is agreeable to contract.

(Signed) "C. B. COLE."

And a certain other letter in the words and figures following:—

"Waterford, December 1st, 1846.

"DEAR SIR—We are directed by the Messrs. Malcomson, Brothers, to require you forthwith to complete your contract made with Mr. C. B. Cole, on their behalf, for the sale and delivery of the cargo of the 'Science,' and in default of your so doing, we are directed to institute legal proceedings to compel you. Hoping that by a compliance with this note such proceedings will be rendered unnecessary, we remain very faithfully yours,

"ELLIOTT and NEWPORT.

"C. S. Morton, Esq., Waterford."

Witness then further deposed that the bad part of the cargo was not worth one-half the value of the sample, and the remainder was worth about sixteen shillings a ton less than the sample, and that one thousand two hundred and fifty quarters would be about two hundred and sixty tons; that the market for Indian corn was rising on the 30th day of November; that it would have taken

a week to land the cargo, and some more time to bring it to Clonmel; that the market continued so to rise, and on the 8th day of December, the cargo would have sold for £15 or £16 per ton. This witness being cross-examined, deposed that the clause in the bought note hereinafter mentioned, undertaking to send boats alongside, was added to said bought note in consequence of the defendant saying that the ship might be delayed, and the defendant be put to the expense of demurrage; and that on the occasions aforesaid he did not bring the sample with him to the ship to compare with the cargo; that the damage to the cargo was caused by heating; that he did not see any of the corn after it was removed from the ship, and that Indian corn when slightly injured by heating will recover completely, but will not recover after it has been much heated; that he had got notice of the arrival of the ship "Science" on the day on which it arrived at Waterford; that the corn which was removed from the bulk on the morning of the 27th of November was in sacks belonging to the plaintiffs, and that they lent the sacks to the defendant to remove the corn from the top of the cargo, and that when he saw the damaged corn he refused to take the whole of the cargo as it stood, and afterwards offered to take so much of the cargo as was good, and arbitrate on the part of it which was bad; that the defendant declined to allow any arbitration, but offered to let the plaintiffs take as much of the cargo as they chose at the price agreed on, and that the defendant would keep the remainder, provided this, if done, should be in satisfaction of the agreement. He also proved the following bought note:—

"I have bought of C. S. Morton, for account of Malcomson, Brothers, the cargo of the 'Science' from Smyrna, say about 1250 quarters of Indian corn as per sample, at £12. 15s. per ton, payment cash, less one-half per cent.; to be taken from alongside the vessel free of charge, except for weighing and measuring.

"C. B. COLE."

"I agree to send boats alongside as soon as I have heard of the vessel being ready to discharge.

"C. B. C.

"Waterford, 23rd November 1846."

The plaintiffs having given some further evidence as to the

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T. T. 1847. *Queen's Bench.* damaged state of the cargo, and the value of Indian corn at the time of its arrival, then closed their case.

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The defendant then proved the arrival of the vessel at Waterford, and several demands on Cole to take the cargo, and his refusal, on the ground of its not being equal to sample; and an offer by the defendant to give the whole, or so much of it as plaintiffs should take, at the contract price, provided what they should take should be in satisfaction of the agreement; this they also declined, and the defendant disposed of it on his own account.

William Peet was then examined, and he deposed that he was a corn merchant and had large dealings in Indian corn; and that the market for Indian corn was in a fluctuating and uncertain state after the 30th of November, after which time it rose considerably.

The defendant's Counsel then asked witness whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn, as distinguished from its condition? This question being objected to, was not allowed by the Judge to be put.

*First Exception.*—Counsel for the defendant excepted to this ruling.

*Second Exception.*—They then called upon his Lordship to inform and direct the jury that the contract, as proved, related to the specific cargo of the ship "Science," and that upon the evidence, the plaintiffs had repudiated the contract by refusing to take that cargo; which his Lordship declined to do.

*Third Exception.*—They then called upon his Lordship to direct the jury that the contract, as proved, was an entire contract respecting the cargo of the ship "Science;" and that if upon the evidence, the jury believed that the plaintiffs refused to take that cargo, the plaintiffs were not entitled to recover in this action for the non-delivery of the cargo; this he also declined.

*Fourth Exception.*—They then required a direction to the jury, that if upon the evidence they believed that the plaintiffs refused to take any part of the entire cargo of the ship "Science," that such refusal amounted to a repudiation of the contract, as proved, and

they should find a verdict for the defendant; this the CHIEF JUSTICE also refused. T. T. 1847. *Queen's Bench.*

*Fifth Exception.*—They then called on his Lordship to direct the jury, that the letters of the plaintiffs or their agent, with the other evidence in the case, amounted to a refusal to accept the cargo of the “Science,” and that the action being for non-delivery, the plaintiffs were not entitled to recover; this he also refused. MALCOMSON v. MORTON.

*Sixth Exception.*—They then called on him to direct the jury that there was a fatal variance between the contract in the bought and sold notes, and the contract as stated in the declaration; and that by reason of such variance, the jury should find for the defendant; which he also refused.

*Seventh Exception.*—They then insisted there was no evidence of non-delivery, or of a refusal to deliver the corn according to the contract, as proved, and called for a direction to that effect; this was also refused.

*Eighth Exception.*—They then insisted that, inasmuch as there was no evidence that the plaintiffs had performed the condition precedent on their part, of sending lighters or boats to take the cargo of the ship “Science,” they should find a verdict for the defendant; his Lordship refused so to direct the jury.

*Ninth Exception.*—They then called on his Lordship to direct the jury that the variance between the bought and sold notes, as to the mode of delivery, prevented the plaintiffs from recovering in this action; which he also refused.

The jury found for the plaintiffs, with £600 damages.

The case having been set down for argument—

*J. E. Walsh* and *Lynch* argued in support of the exceptions.

This was a contract to deliver an ascertained cargo of corn as per sample. The nature of such a contract is to deliver a certain thing, with a collateral condition that it will prove equal to the sample: *Parker v. Palmer* (a); and though the non-performance of that condition may entitle the purchaser to refuse it, it does not entitle

(a) 4 B. & Al. 387.

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him to bring an action for *non-delivery* after refusing it; for the refusal is a repudiation of the contract, and his only remedy then is to sue on the warranty implied on the sale. He cannot both sue on the contract and disaffirm it; in no text-book is such a right stated. The contract here was satisfied by the tender made to the plaintiffs, and they chose to reject it. A sale of such a commodity as corn by sample necessarily identifies the thing sold, viz., the bulk of which the sample is a part; and if that bulk be tendered, and the buyer rejects it, that is a repudiation of the contract, and there is therefore an end of it. But the contract here further ascertains the identity of the thing sold, viz., the specific cargo on board the "Science" at the time of the sale, and the seller was only bound to deliver what was then in the vessel, no matter what may have been the nature of it: *Lovatt v. Hamilton* (a); that was a contract to deliver on the arrival of a vessel fifty tons of oil, and it was held that the party was only bound to deliver what was on board at the time of its arrival. And the same doctrine has been repeatedly affirmed in other cases, where the language of the contract by any similar expression identifies the thing sold: *Johanson v. Macdonald* (b); *Boyd v. Siffkin* (c); *Hawes v. Humble* (d); *Idle v. Thornton* (e); *Toulmin v. Hedley* (f). Therefore, though we admit that when a warranty is part of the description of the thing sold, as on a sale of a cargo warranted to be Smyrna wheat, if a commodity not answering that description—American oats, for example, were tendered, the buyer might refuse it and then sue for non-delivery, because the thing sold was never offered; yet that rule cannot be applied to such a contract as this. Here there was some evidence of a refusal of the whole cargo, and clear proof of a refusal of part of it, by the plaintiffs; and as the contract was entire, that had the same effect as a refusal of the whole. If that evidence is so conclusive that the jury could only find one way upon it, we were entitled to a direction as insisted in the second and third exceptions; but at all

(a) 5 M. & W. 639.

(c) 2 Camp. 326.

(e) 3 Camp. 274.

(b) 9 M. & W. 606.

(d) *Ibid*, note.

(f) 2 Car. & K. 157.

events we were entitled to have the question submitted to the jury as insisted on in the fourth exception.

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As to the first exception. We were entitled to put that question; there was no evidence that the corn was inferior in quality, but that the condition of it was different from what it was at the time the contract was entered into, the deterioration being caused by heating; and if, according to the custom of merchants in reference to such contracts, it was thereby to be considered equal to sample, it puts an end to all pretence for hesitation by the plaintiffs, and the question was therefore material.—[BLACKBURN, C. J. There was no ground laid for the question as to what was the custom of the trade; if such had been done, I might have better understood the question, and perhaps allowed it.—CRAMPTON, J. The sample was a portion of the thing sold, and is a warranty that it is of the same nature with the thing sold; I apprehend sample as much implies soundness as the nature of the thing itself.]—The witness might have proved that according to the custom of trade a sale per sample, without further words, does not imply that the corn will arrive in the same condition; and the question was within the rule allowing parol explanations of mercantile contracts to show that the words are understood in a qualified sense, or a different sense from that attached to them in ordinary usage: *Clayton v. Gregson* (a); *Bold v. Rayner* (b); *Haynes v. Halliday* (c); *Smith v. Wilson* (d); *Powell v. Horton* (e); *Hutchinson v. Bowker* (f); *Mallan v. May* (g); *Lilly v. Ewer* (h); *Anderson v. Pitcher* (i); *Chaurand v. Angerstein* (k); *Regina v. The Inhabitants of Stoke-on-Trent* (l).

As to the sixth exception. There is no count in the declaration treating the contract as one to deliver when boats were sent alongside the vessel. The words "to be taken from alongside" imply something to be done by the vendee, who is to be active in getting

(a) 5 A. & E. 302.

(c) 5 M. & P. 572.

(e) 3 Scott, 110.

(g) 13 M. & W. 511.

(i) 2 B. & P. 164.

(b) 1 M. & W. 343.

(d) 3 B. & Ad. 728.

(f) 5 M. & W. 535.

(h) 1 Doug. 72.

(k) Peake, 61.

(l) 5 Q. B. 303.

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the cargo, and which must be taken as part of the contract, and the omission to state it causes a fatal variance: *Malone v. Wolfe* (a). Though it might be argued on the evidence that we had waived this term of the agreement, that cannot help the want of this averment in the declaration.

The seventh exception is, that the breach does not meet the evidence, which involves the same considerations as the second, third and fourth, viz., that the defendant offered the plaintiffs the specific cargo they bought, and this consideration also, that the contract was to deliver on certain conditions, viz., the having lighters sent alongside, and there was no refusal to deliver under such circumstances.

The eighth exception is involved in the sixth exception; for if the sending lighters alongside was a part of the contract, it was plainly a condition precedent, and its performance, or an excuse for non-performance, should have been pleaded and proved: *Parker v. Rawlings* (b); *Atkinson v. Smith* (c).

The ninth exception relies on a variance between the bought and sold notes, the one containing the terms respecting the sending boats alongside, which is omitted in the other. This is a material part of the contract, which is the very gist of this action; and when there is a material variance between the bought note and the sold note, no contract arises at all: *Grant v. Fletcher* (d); *Thornton v. Kempster* (e); *Gregson v. Ruck* (f).—[PERRIN, J. If there be a variance there is no doubt in the case.]

*Lawson, Harris and Martley*, contra.

As to the first exception. The cargo was sampled at Cork, and it is clear that it was not afloat at that time. The words of the contract are quite unambiguous; it was plainly intended the cargo should correspond with the sample. The cases as to the admissibility of parol evidence of custom are collected in *Wigglesworth v. Dallison* (g),

(a) 2 H. & Br. 207.

(c) 14 M. & W. 696.

(e) 5 Taunt. 786.

(b) 12 B. Mo. 529.

(d) 5 B. & C. 436.

(f) 4 Q. B. 737.

(g) 1 Smith, L. C. 306.

where there is no ambiguity, evidence of usage is not admissible : *Yates v. Pym* (a) ; *Blackett v. Royal Exchange Insurance Company* (b) ; *Anderson v. Pitcher* (c). Lord Eldon there regrets that the practice has been pushed so far, and no case can be found in which the custom has been allowed to vary so plain a contract as the present.

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As to the second exception, they were not entitled to a direction as sought. The words, "the cargo of the 'Science,'" were mere words of description, the essence of the contract being that it should contain corn of the same quality with that in the sample. The cases cited from *Campbell* do not apply to the present. In these there was an implied condition that the vessel should arrive ; but here there is an express warranty that the cargo should be the same with the sample ; and in the cases cited there was no express contract.

Then, as to the third and fourth exceptions, the third exception is informal, and the Court cannot give judgment on it. It is not sufficient in excepting, to state that the Counsel requested the Judge to leave a certain question to the jury, and that he refused to do so, it must be shown how he did direct them : *M'Alpine v. Magnall*, C. P. (d) ; because, for any thing that appears, the Judge may have in substance given that direction ; besides, they were not entitled to this direction. They called on the Judge to direct the jury that this was an entire contract, and that the plaintiffs were bound to accept or reject the whole ; but upon the true construction of the contract it was only a contract to take so much as agreed with the sample : *Graham v. Jackson* (e) ; *Cutter v. Powell* (f) ; *Bragg v. Cole* (g). Here there was no repudiation of the contract. If we had absolutely refused to take the cargo, a question might be raised that we had rescinded the contract.

The sixth exception is founded on a misapprehension. The contract here was not grounded on the bought and sold note : *Rowe v.*

(a) 6 Taunt. 446.

(b) 2 Tyr. 266.

(c) 2 B. & P. 168.

(d) 22 Law Jour. 299 ; S. C. 3 C. B. 496.

(e) 14 East, 498.

(f) 2 Smyth, L. C. 11.

(g) 6 B. Moore, 114.

T. T. 1847. *Osborne (a)*; *Squier v. Hunt (b)*. And even if it were, it would be only necessary to set out so much of the contract as relates to the breach complained of. As to sending lighters alongside the vessel, that could not be considered a condition precedent: 1 *Wms. Saund.* 320, *b*. This was a distinct contract by the defendant. If there be a variance between the bought and sold notes, no contract arises, because of the uncertainty: *Thornton and others v. Kempster*. The difference here was in a memorandum to do a particular thing in a specific way: *Trueman v. Loder (c)*; *Germaine v. Burton (d)*.

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*Lynch* replied.

*Cur. ad. vult.*

BLACKBURNE, C. J.

June 4.

The declaration in this case contains several counts. It is sufficient to state the first of them. It avers that the defendant sold to the plaintiffs the cargo of the ship "Science" from Smyrna, laden with Indian corn, containing about 1250 quarters *as per sample thereof*, at £12. 15s. per ton, to be taken from alongside the vessel, to be delivered to the plaintiffs on the arrival of the ship at Waterford. It states a promise to deliver the corn on the arrival of the vessel at Waterford, and that though she arrived there, and though the plaintiffs requested the defendant to deliver the said Indian corn according to the terms aforesaid, the defendant did not, nor would, deliver it, or any part of it, but wholly neglected and refused so to do. This breach is the simple non-delivery of the corn; there is no complaint that the defendant did not deliver corn agreeing with the sample, or that the corn, which formed the cargo of the "Science," was not equal to the sample. The issue to be tried did not involve any other questions than these: was there such a contract, and was it broken by the non-delivery of the corn, the subject matter of it? The verdict has found that the corn was

(a) 1 Star. R. 140.

(b) 3 Pri. 68.

(c) 11 Ad. & El. 597.

(d) 3 Stark. N. P. Cas. 32.

not in fact delivered, and that the defendant, though requested, refused to deliver it.

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It occurred to the Court, pending this argument, that if the jury should have been of opinion that the defendant offered to deliver the cargo, and that the plaintiffs refused it because not equal to sample, it might have been objected that the breach as laid was not proved ; but this is not the matter of any of the nine exceptions, to understand which it is necessary to state a short summary of the facts. The contract for the sale of this corn was made on the 23rd of November 1846, at Waterford ; at that time the vessel the "Science" was at Cork, the sale was by sample taken from her at Cork, and on the 26th she arrived at Waterford. The contract is in these words :—  
"Sold Messrs. Malcomson, Brothers, of Clonmel, per Mr. Cole, the cargo of the 'Science' from Smyrna, say about 1250 quarters of Indian Corn as per sample, at £12. 15s. payment cash, less one-half per cent, to be taken from alongside the vessel free of charge except weighing and measuring. Waterford the 23rd of November 1846. C. S. MORTON." When the vessel arrived in Waterford the defendant would no doubt have delivered the whole cargo ; but the plaintiffs' agent at once objected that the portion of the cargo at first broken was inferior to the sample ; this led to a negotiation in the course of which the plaintiffs offered to take as much as was equal to the sample, and to leave their right in regard to the remainder to arbitration. On the other hand there was the evidence of Cole, on his cross-examination, that the defendant declined to arbitrate, but offered to let the plaintiffs take as much of the cargo as they chose at the price agreed on, and that the defendant would bind himself to keep the remainder, provided that if this were done it should be in satisfaction of the agreement. The negotiation closed with the letter of the 1st of December, from the plaintiffs, requiring the defendant to complete his contract, or in default thereof they would institute legal proceedings.

Different questions have been discussed, on which, in my view of this case, we are not called on to give an opinion ; one of these, however, I think it right to advert to. It is contended for the defendant, that as this was the sale of a specific cargo, with a war-

T. T. 1847. ranty that it agreed with the sample, the plaintiffs could not bring  
*Queen's Bench.* any action for the non-delivery of it, if it were offered to them,  
 MALCOMSON though it was not in the condition warranted; or in other words,  
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 MORTON. that if they meant to abide by the contract, they should have  
 accepted the corn, and sued for breach of the warranty.

There can be no doubt that a man who buys by sample may refuse to receive the property, if it do not agree with the sample, and can on that ground defend an action for the price; but this does not support the position, that by refusing to accept, he necessarily rescinds the contract; for that no authority is cited, and in the absence of authority, I should have difficulty in holding that one who buys without seeing it a quantity of corn, or of any other article, whether specific or not, the value of which is fluctuating and uncertain, on a stipulation that it is of a certain quality, should not be at liberty to reject it if it did not agree with the description, and sue for and recover the value which it would have borne if it had. Nor have we to consider whether, according to the facts proved, the declaration should have averred a breach by the non-delivery of corn agreeing with the sample; for this question is not before us, and we have now merely to decide on exceptions, the record averring an indisputable breach, the non-delivery of the corn.

The first exception is, on the ground of the rejection of the following question by the Judge:—"Whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn as distinguished from its condition?" This question does not appear to have been preceded by any inquiry as to the difference, if there be any, between the terms quality and condition; but take it to be as stated at the Bar, I think the question was objectionable on two grounds; the first, that if its object was to vary the plain meaning of the contract, the words "as per sample" are, in my opinion, perfectly unambiguous, and in this contract must mean, as indeed the question assumes that they ordinarily do in all contracts, that the sample being a part of the article, both are in all respects the same. The cases referred to by Mr. *Lawson* in his very able argument show, that where the

language and terms of the contract are plain and unambiguous, the usage of trade cannot be admitted to vary or contradict them: *Wigglesworth v. Dallison*. But take the explanation to be correct which was given by Mr. *Walsh*, who argued this case also very ably, that a sale by sample of corn afloat refers to the quality of the article then or before its shipment, the question put was objectionable, for it assumes that the corn here was sold when afloat—the fact is otherwise, the vessel had come from Smyrna to Cork, the sample was taken, not at the port of shipment but at Cork, after the voyage from Smyrna was completed, and there was no reason to presume or suspect that the cargo had undergone any change between the time the sample was taken from the bulk and the time the vessel arrived in Waterford. This therefore discloses the further ground of objection, that the question was irrelevant in this state of facts.

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I now come to the other exceptions, every one of which is open to the well-founded objection, that it states merely what the Judge refused to do, and does not contain any statement of what the charge was, or in what, if any, respect it was objectionable; on this ground alone all the exceptions must be overruled. But in my opinion every one of them is untenable on the merits.

The second exception called for a direction that the plaintiffs repudiated the contract by refusing to accept the cargo. This assumes as a matter of fact that the plaintiffs did refuse to accept the corn, and that he was bound to accept it, and it asks for a direction to the jury of a matter of fact, namely, whether the contract was repudiated.

The third exception is, that the contract as proved was an entire one for the cargo of the ship "Science," and if the jury believed that the plaintiffs refused to take that cargo they should find for the defendant. Nothing can show more strongly than the argument on this exception, the necessity of stating how the Judge directed the jury. The record states a refusal of the defendant to deliver. This is the matter in issue, and it is found that he did refuse; this finding must have been under some opinion or direction, to which, whatever it was, no objection was

T. T. 1847. made, and which therefore must be presumed to be right; the  
*Queen's Bench.* obvious consequence of which is, that the jury which found with-  
 MALCOMSON out objection that the defendant refused to deliver, could not  
 v. have found that the plaintiff refused to accept: in such a state of  
 MORTON. things, how can we say the verdict is wrong, or award a *venire de novo*?

But this exception contains another and distinct proposition, that the contract proved was an entire contract for the cargo of the "Science." What the Judge was to understand by the word entire, it is not easy to say; but in argument the exception is treated as if it were that the contract was for the specific cargo of the "Science;" and it is then contended that this stands on the same footing as a contract for the sale of a specific chattel, as to which it is assumed, that if the purchaser refused to receive it, he is without remedy. As to the position so assumed, I have already said, that it is not supported by authority, and I cannot assent to the proposition, that where the terms of a contract are to deliver goods, whether generally or specifically described of a certain quality and description, the right of the purchaser to the benefit of it is gone, if he refused to accept goods of an inferior quality and of less value, and that he must abide by the loss and inconvenience, no matter how great, if he do not accept an article that may be utterly worthless to him in regard to the purpose for which he required it.

I further think that this third exception has been argued on another assumption, to which I am not prepared to assent, viz., that this is to all intents a sale of a specific, individual chattel; it is, no doubt, a sale of the cargo of the ship "Science," but it is a sale of that absolutely, not *pro bono aut malo*; for it is a sale of it, if it answer the description which the defendant pledges himself that it does; and I further think that it may be argued, as it has been, that it was only a sale for so much of the cargo as was equal to the sample.

It is, however, not necessary for us, in order to decide this exception, to affirm or deny the position which it assumes as to the effect of this contract; we overrule it, on the other grounds I have stated. The same observations which apply to the third will be found to

supply the reasons for our overruling the fourth and fifth exceptions.

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The sixth exception is, that there was a variance between the contract stated and that proved. The ground of this is, the addition made to the bought note. The words added are, "I agree to send "boats alongside as soon as I hear of the vessel being ready to discharge." This was signed by Cole, the agent of the plaintiffs. We think that this was not a condition the performance of which by the plaintiffs it was necessary to aver, and even if it were one of the terms of the contract, it was not necessary for the plaintiffs to state it, or state more than was requisite to show that they had a right of action; but in fact, it adds nothing to the substance of the contract, and is only an engagement by the plaintiffs' agent to fulfil expeditiously the agreement on his part of that portion of the contract which bound him to take the cargo from alongside the vessel. For these reasons the sixth, eighth and ninth exceptions are to be overruled.

The seventh exception is, that there was not any evidence of non-delivery, or of a refusal by the defendant to deliver corn pursuant to the contract. It is not possible to hold this, when we remember the letter of the plaintiffs' attorney, of the 1st of December, and the offer of the defendant to give part of the cargo and retain the residue, but on the condition of the plaintiffs' waiving their right to the benefit of the contract. In fact there was not any evidence of an offer of the whole cargo to the plaintiffs, or of any requisition to him to accept the risk, after the controversy about the condition of it arose, and it was manifestly the intention of the defendant to get rid of his liability by offering to give the plaintiffs a part in satisfaction of the whole of the contract.

BURTON, J.

I have had no material doubt on any of the exceptions, except on the one resting on the propriety of the question put to the witness as to the usage of the trade. I think, however, the question was open to the objections stated by the LORD CHIEF JUSTICE, and that the exceptions are altogether informal, as they do not specify what the Judge said.

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It is unnecessary for me to dwell on this case. I think all the exceptions ought to be overruled ; but I do not offer any opinion on the frame of the declaration, how far it is applicable to the state of facts proved, or to the conclusions of law deducible from them. We cannot in this Court consider any thing but the bill of exceptions. In another Court questions may arise which may render it necessary to consider these matters. It is enough for me to say I entirely concur in overruling all the exceptions, and that judgment be entered for the plaintiffs.

PERRIN, J.

I think the first exception ought to be overruled, and that the question proposed to expound the sale by sample, according to a supposed usage in the corn trade, ought not to have been put. It assumed that the sample had been taken before the commencement of the voyage, which not only was not proved, but the contrary of which is to be inferred, viz., that it was taken in Cork. Next it proposed to prove, not a particular usage of a trade, but to give a particular colour to the general rule of all sales by sample, which purports to show the state of the thing when sampled, and not to warrant its continuance in that condition after the accidents of a long voyage, and thence to imply an obligation on the vendee to take the article notwithstanding changes which had taken place in it during the voyage.

On the second exception, even if properly taken, I think the CHIEF JUSTICE ought not to have told the jury that the plaintiffs repudiated the contract (in the first four counts set forth) by refusing to take the cargo, on the ground that it was damaged and inferior to the sample. I do not accede to the position that the vendee of a cargo afloat sold by sample is bound to accept an inferior and damaged article, in order to entitle him to maintain an action for the damage he may have sustained by reason of the vendor's failure to perform his contract to deliver a sound marketable article such as the sample.

On the third exception, if properly taken, I am strongly inclined

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to hold that in this action, that is, on this declaration as framed, which in every count, especially in the last five, complains of a general non-delivery—not of a non-delivery of sound undamaged Indian corn, according to and such as the sample, the plaintiffs were not entitled to recover, because the defendant did offer to deliver the article, the specific subject of the contract (though not in the condition warranted), which the plaintiffs refused to accept, and therefore the plaintiffs failed to prove the breach complained of; though I do not hold there was any evidence that they rescinded or repudiated the contract; but upon the authority of *M'Alpine v. Magnall*, we are precluded from entertaining the question, as the exception is taken, and the record stands. The opinion of Parke, B., upon the subject is clear and full; for, after observing upon other points, he says:—"We are all of opinion that the form in which the exceptions in this case are taken precludes us from giving judgment for the plaintiff in error, even if we should think the argument urged on his behalf well founded. It is a misdirection, and not a non-direction that is the proper subject of a bill of exceptions." And there is the case of *Kemmis v. Lord Trimleston*, in which this distinction is supported by Tyndal, C. J. Upon this it appears still open to the plaintiffs to apply to the CHIEF JUSTICE to amend the record; but unless that be done, we are precluded by that authority.

The same observations apply to the fourth exception as to the second, and to the fifth as to the third. On the sixth exception, I think there was no variance, as contended for by the defendant. The particular portion of the sold note relied on was, an undertaking by the agent, no part of the bought and sold notes (or original contract), each of which was signed and so complete, but added by the agent after the contract was complete and signed by both parties, on his part to do a matter of convenience to the plaintiffs; possibly it might have been in strictness proper to submit that matter to the jury for their opinion; but that was not called for, and I am not disposed to assist an objection quite beside the merits of the case, and so defeat the plaintiffs, if otherwise entitled.

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My observations on the third exception apply to the seventh;  
and those on the sixth exception apply to the eighth and ninth.

Exceptions overruled.

MILLNER in Error v. O'BRIEN.

June 4.

On a writ of **ERROR**, from the Recorder's Court of the borough of Dublin. The Recorder's Court of the borough of Dublin, these several errors were assigned; that no original writ was stated on the record as having been filed; that it did not appear that the plaintiff therein mentioned was returned *non est inventus*, or that the plaintiff was ever returned or issued; that there was no averment that any summons had issued or been served previous to the attachment, and that there was no entry thereof, and that no process upon the plaintiff was stated to have been made or issued; that there was no sufficient affidavit of debt according to the statute, and that the attachment and bail-piece were not in accordance with the form given by the statute; that there was a variance between the plaintiff and the declaration; that no writ of *distringas*, or *venire*, or jury process was averred, and that there was no proper entry of continuances or of *similiter*.

*Held*, that since the passing of 3 & 4 Vic. c. 108 (the Municipal Act), the non-averment on the record of a summons issuing before attachment granted is immaterial.

*Held also*, that no objection for the want of a *distringas*, *venire* or jury process could be raised, when there was a statement that a jury had been sworn and given a verdict.

*Held also*, that the Statute of Jeofails and the appearance of the defendant below cured the other errors assigned.

"ing to the custom of the said borough and Court, then and there  
 "affirmed, made and levied to and before The Right Honorable  
 "Frederick Shaw, Recorder of the said borough, Judge of the said  
 "Court, his certain plaint against John Millner, the defendant in  
 "this suit, of a plea of debt of £1,200 of lawful money of Great  
 "Britain, that he render unto the said Thomas O'Brien the said  
 "sum of £1,200, which he owed unto him within the jurisdiction  
 "of the Court, and unjustly detained, and soforth: and the said  
 "Thomas O'Brien, according to the custom, found pledges to prose-  
 "cute the said plaint, John Doe and Richard Roe; and the said  
 "Thomas O'Brien then and there put in his place Charles Fitz-  
 "gerald his attorney against the said John Millner in the said  
 "plaint, according to the said custom; and the said Thomas  
 "O'Brien, according to the custom of the said borough and Court,  
 "and pursuant to the statute in that case made and provided, veri-  
 "fied his said plaint, and also that his cause of action in said plaint  
 "had accrued in the said borough within the jurisdiction of the  
 "Court, by affidavit in writing, in that behalf by him then made  
 "and duly sworn before the then Lord Mayor of the said borough  
 "and within the jurisdiction of the said Court; and that the said  
 "Thomas O'Brien was apprehensive that the said debt would be  
 "lost to the said Thomas O'Brien, unless aided by process of the  
 "said Court to attach the goods of the said John Millner; and the  
 "said Thomas O'Brien then and there filed the said affidavit in  
 "the said Court, and thereupon, at the prayer of the said Thomas  
 "O'Brien, made by his said attorney at the same Court, according  
 "to the custom, John Judkin Butler, marshal and minister of the  
 "said Court, and the proper officer in that behalf, is commanded by  
 "the Court, according to the said custom and statute, that he attach  
 "the said John Millner by his goods and chattels, if found within  
 "the jurisdiction of the said Court, so that the said John Millner  
 "be before the said Recorder, Judge of the Court, at the then next  
 "Court, to be holden at the Sessions-house, Green-street, in said  
 "borough, on Thursday the 19th day of March, in the year of our  
 "Lord 1846, to answer the said Thomas O'Brien in the plea afore-  
 "said; and what the said marshal and minister would do therein,

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"that he should at the said next Court certify to the said Court, and  
"the same day is given to the said Thomas O'Brien in the plea  
"aforesaid, at which said Court holden, and soforth, the said  
"Thomas O'Brien, by his said attorney, comes and appears, and  
"the said John Judkin Butler, marshal and minister of the said  
"Court, then and there returned to the Court that by virtue of  
"the said precept to him in form aforesaid directed, he, within the  
"jurisdiction of the said Court, had attached the said John Millner  
"by his goods and chattels within the same, to wit, sundry lamps  
"and articles of household furniture, and other goods and chattels  
"in a schedule, to said return annexed, mentioned, which he had  
"ready to answer here, as by the said precept he was commanded ;  
"and thereupon at the same Court holden, and soforth, to wit, on  
"Thursday the 19th day of March, in the year aforesaid, according  
"to the custom of the said borough and Court, the said John Millner  
"comes in his proper person, at Halston-street, in the said borough  
"and within the jurisdiction of the said Court, before The Right  
"Honorable John Keshan, then Lord Mayor of said borough, and  
"then and there finds bail and pledges for him the said John  
"Millner in the plea aforesaid, according to the custom, and soforth,  
"and the form of the said statute, to wit, John Gallie and Richard  
"Sawyer, who came then and there before the said Lord Mayor, in  
"their proper persons and according to the custom of the borough  
"and Court and the form of the said statute, did give bail, and each  
"for himself did give bail for the said John Millner in the plea  
"aforesaid, that he the said John Millner should stand right in the  
"said Court until the end of the said plea, and did acknowledge,  
"give bail and grant, and each of them did acknowledge, give bail  
"and grant, that if it should happen that the said John Millner  
"should be lawfully convicted or condemned of the said debt in the  
"plea aforesaid, or any part thereof, then that they the said John  
"Gallie and Richard Sawyer should and would jointly and severally  
"pay all such debt, damages, expenses and costs as should be  
"adjudged to the said Thomas O'Brien on the plea aforesaid against  
"the said John Millner ; and the said John Millner, at the Court  
"holden on said 19th day of March, in the year aforesaid, puts in

"his place Henry Cunningham Kelly his attorney, against the said Thomas O'Brien in the plea aforesaid, according to the said custom; and thereupon, with the assent of the said parties, a day is given to the parties aforesaid in the plea aforesaid until the then next Court, to be holden, and soforth, on Monday the 23rd day of March, in the year aforesaid, at which said Court holden, and soforth, to wit, on Monday the 23rd day of March, in the year aforesaid, according to the custom of the borough and Court, came the said Thomas O'Brien and the said John Millner by their said attorneys, and the said Thomas O'Brien, by his said attorney, declaring upon the plea aforesaid, exhibits in the Court his certain declaration against the said John Millner, according to the custom, in the words following:—'In the Record Court of the borough of Dublin, county of the city of Dublin, to wit; Thomas O'Brien plaintiff, John Millner defendant. As of Thursday the 19th day of March, in the year of our Lord 1846. John Millner, the defendant in this suit, was summoned to answer Thomas O'Brien, the plaintiff in this suit, of a plea that the said defendant render to the said plaintiff the sum of £6000 sterling, which the said defendant owes unto the said plaintiff, and unjustly detains from him, and soforth; and thereupon the said plaintiff, by Charles Fitzgerald, his attorney, complains.'"

The record then set out a declaration in debt in the common form, on promissory notes and the money counts, and that John Millner took defence thereto, and prayed leave to imparl, which was granted.

It then set out several continuances up to the 13th of April, when the defendant pleaded *nil debet* and a set-off.

Several other continuances were then set forth, up to the 21st of September, when the plaintiff replies, and a rejoinder is also set forth joining issue.

The record then proceeded:—"And thereupon in the said borough, being in itself a county of a city, that is to say, the county of the city of Dublin, the Sheriff of the county of the city of Dublin is commanded that he cause a jury to come, and soforth, at the Court of our said Lady the Queen of said borough, before The Right Honorable Frederick Shaw, Recorder of the said borough,

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" Judge of the said Court, at the Sessions-house of and in the said  
 " borough, on Thursday the 8th day of October, in the year afore-  
 " said, by whom and soforth, and who neither and soforth, and to  
 " recognise and soforth ; and the same day is given to the parties,  
 " with their assent and soforth ; and thereupon afterwards, to wit,  
 " on Thursday the said 8th day of October, in the year aforesaid,  
 " before The Right Honorable Frederick Shaw, Recorder of the  
 " said borough, Judge of the said Court, at the said Court of Record  
 " of our Lady the Queen of the borough, holden at the Sessions-  
 " house of and in the borough ; the jury between the said parties,  
 " to wit (naming them) jurors of the borough aforesaid, being duly  
 " summoned by the said Sheriff, come to speak the truth of the  
 " matters wherein issue is joined as aforesaid, on the plea afore-  
 " said, between the parties aforesaid. And the said Thomas O'Brien  
 " and John Millner, by their said attorneys also came, and the jury  
 " aforesaid being duly chosen and sworn to try the said issues, and  
 " having tried the same, say upon their oath, that the said John  
 " Millner is indebted to the said Thomas O'Brien in the said debt  
 " or sum of £1,200, parcel of the said debt above demanded, in  
 " manner and form as the said Thomas O'Brien hath above thereof  
 " complained against the said John Millner ; and that the said  
 " Thomas O'Brien did pay to the said John Millner the said sum  
 " of £2002. 2s. 8d., as in that behalf above alleged as aforesaid ;  
 " and that the said Thomas O'Brien was not nor is indebted to the  
 " said John Millner in manner and form as above in that behalf  
 " alleged, and they assess the damages of the said Thomas O'Brien,  
 " occasioned by the detention of the said debt or sum of £1200,  
 " parcel and soforth, to the sum of six pence, as for his costs and  
 " charges by him about his suit in that behalf expended : and there-  
 " upon the said Thomas O'Brien freely here in Court render to the  
 " said John Millner the said sum of £4800, residue of the said sum  
 " of £6000 above demanded, and all damages occasioned by the  
 " detention thereof ; and the said Thomas O'Brien prays judgment  
 " of the said sum of £1200, parcel and soforth, together with his  
 " damages aforesaid, and soforth ; and thereupon the premises being  
 " seen and by the Court fully understood, it is considered by the

"Court that the said Thomas O'Brien do recover against the said John Millner his said debt of £1200, parcel and soforth; and also the sum of £42. 8s. 10d. as well for his damages on the occasion of the detention of said debt of £1200, parcel and soforth, as for his costs and charges by the Court here adjudged of increase to the said Thomas O'Brien, and with his assent, and the said John Millner is in mercy and soforth; and let the said John Millner be acquitted of the said sum of £4800, and the damages aforesaid, in form aforesaid remitted and soforth." To this record the following errors were assigned:—

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First—That by the record aforesaid, it appears that the said John Millner was attached to answer the said Thomas O'Brien in the plea aforesaid; yet no original writ between the parties aforesaid in the plea aforesaid is stated on the said record as having been filed, or as remaining of record in the said Court of our said Lady the Queen of the borough of Dublin, at the place aforesaid.

Second—That it is not in or by or upon said record stated, that the plaint therein mentioned was returned *non est inventus*; or that the said plaint was ever returned or even issued to the Serjeant-at-Mace or other officer of the said Court.

Third—That it is not in or by said record stated, that any summons issued to, or was served upon or at the dwelling-house of the said John Millner.

Fourth—That no summons, previous to said attachment, is averred on said record to have been issued to or served upon the said John Millner.

Fifth—That there is no entry of any summons made to the said John Millner at the suit of the said Thomas O'Brien.

Sixth—That the first process as stated in and by the said record, is that of attachment; whereas it ought by law to have been a summons.

Seventh—That in the entry on said record, the plaint therein mentioned is stated to have been levied before any affidavit of debt was sworn and filed; whereas, according to law, the affidavit of debt ought to have been stated to have been sworn before the levying of a plaint.

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Eighth—That no process upon the plaint in said record mentioned is averred to have been made or issued, except the process of attachment therein also mentioned.

Ninth—That no proper or sufficient affidavit of debt, according to the statute in said record mentioned, is averred in said record.

Tenth—That the attachment in said record stated is not in accordance with the form given by the said statute.

Eleventh—That the said process of attachment departs from the form given by said statute.

Twelfth—That the bail-piece therein mentioned does not correspond with the form given by said statute.

Thirteenth—That there is a variance between the plaint set out on said record and the declaration set forth on said record.

Fourteenth—That the plaint is for £1200, and the declaration is for £6000.

Fifteenth—That it is in said record stated that the said Thomas O'Brien affirmed, made and levied his plaint against the said John Millner, of a plea of debt of £1200; and in and by said record it is averred, in that part professing to state the declaration, that John Millner was summoned to answer Thomas O'Brien, of a plea that the said defendant render to the plaintiff the sum of £6000, which is inconsistent and repugnant, and is a variance.

Sixteenth—That an ancient custom of a certain borough is therein mentioned; whereas there could not be, according to law, any custom in said borough from time whereof the memory of man is not to the contrary.

Seventeenth—That the said borough is alleged to be the county of the city of Dublin.

Eighteenth—That no writ of distringas or venire or jury process is averred on said record.

Nineteenth—That the judgment in said record mentioned is averred to have been given immediately on the verdict, without any rule for that purpose made, entered or given, or any opportunity of showing cause against the same.

Twentieth—That in several of the continuances entered on said record, it is not averred that the parties plaintiff or defendant or

their attorneys respectively, appeared in Court on the days therein said to have been given.

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Twenty-first—That no warrant of attorney, made by the said Thomas O'Brien to Charles Fitzgerald, as his attorney, to appear for him or prosecute said suit, is averred to have been ever executed by the said Thomas O'Brien, or filed in said Court.

Twenty-second—That no warrant of attorney, made by the said John Millner to Henry Cunningham Kelly, as his attorney, to appear for him or defend said suit, is averred to have been ever executed by said John Millner, or filed in said Court.

*Francis A. Fitzgerald*, and *Macdonogh*, for the plaintiff in error.

This being a writ of error from an Inferior Court, which, from its nature makes it difficult to have the merits appear on the record, and as in such a case a bill of exceptions does not lie, neither can a new trial be granted;\* this Court will see that all the requisites necessary have been done in the proceedings of the Court below, as the regularity of those proceedings is the only security a defendant has.

Several errors have been assigned, which may be classed under three heads. The first class are reducible to this, that the only process stated on the record is the attachment; the defendant was attached to answer the plaintiff, but no original writ was filed, or plaint, process, or summons issued or returned, to ground the issuing of such attachment. In the Superior Court, until the original writ issues out of the Court of Chancery, the Court of Law has no jurisdiction; so in Inferior Courts, unless an original writ, or a plaint or summons, which is equivalent thereto, be issued and returned and filed, no attachment can issue; the writ of attachment being but mesne process, is only given when the defendant has been summoned to appear and makes default: *Gilb. on Distresses*, p. 19, by *Hunt*.

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\* The Statute of Westminster 2, allowing bills of exceptions, was extended to Inferior Courts: *Tidd Prac.* p. 911, 8th ed.; but that right is now taken away by 3 & 4 Vic. c. 108, s. 175: *Sullivan v. Burke*, Q. B. 10 Ir. Law Rep. 205.

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The nature of the process by attachment is altered by the Municipal Act; formerly it was only to enforce appearance, but now, by virtue of that statute, s. 181, it is a process for enforcing bail to the action. The question then is, is the omission of this averment of an original writ, error on the record? *Pratt v. Dixon (a)*. There the error assigned was, that in an action of debt the record was *attachiatus est*, where it ought to have been *summonitus est*; for that ought to be as an original, and for want thereof it was adjudged error, and that such was not aided by the Statute of Jeoffails, for it did not extend to process in the nature of an original writ. In *Moravia v. Sloper (b)*, it was held that a *capias* cannot be issued out of an Inferior Court without a precedent summons to warrant it, and the Court will not intend that a summons issued: *Bruce v. Wait (c)*; *Ward v. Ellayn (d)*; *Tuthill v. Milton (e)*.

The next class of objections rest on this, that the affidavit of debt, process of attachment and bail-piece, are not conformable to the form pointed out by the Municipal Act, 3 & 4 Vic. c. 108. The 181st section directs that the plaintiff shall verify the cause of action, whereas by the record here he only verifies the plaint; the affidavit should also state that the debt is in danger of being lost, and that the amount has been demanded, otherwise there is nothing to authorise the putting in bail, for there is no notice of the sum demanded, and the attachment does not specify the sum.

Then there is another class of errors assigned, viz., a variance between the plaint set out on the record and the declaration, the plaint being for £1200 and the declaration for £6000: *Staughton v. Newcomb (f)*.

The fourth class of objections assign that no writ of *distringas*, *venire*, or jury process is averred on the record. It is not stated by whom the said Seneschal is commanded, nor is the number of jurors

(a) Cro. Jac. 108.

(c) 1 M. & Gr. 1.

(e) Yelv. 158.

(b) Willes, 38.

(d) Cro. Jac. 261.

(f) Cro. Eliz. 434.

specified, nor that it was done at the same Court: *Anonymous* (a); *Hayward v. Davenport* (b); *Coward v. Redwood* (c). T. T. 1847.  
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Then another class of objections is grounded on this, that there is no sufficient entry of continuances on the roll. The 38 *Hen.* 8, c. 30, is the English Act on this subject, and the analogous Irish statute is 33 *Hen.* 8, sess. 2, E, 3. The omission of a similiter to the pleas of payment and set-off is also error, and will not be aided by the Statute of Jeoffails: *Cooper v. Spencer* (d). If a similiter be not added, the Court has no jurisdiction to try the case: *Heath v. Walker* (e); and the omission of this cannot be remedied by amendment: *Griffith v. Crockford* (f). MILLNER  
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*James Robinson*, and *Napier*, for the defendant in error.

Most of the errors assigned in this case are cured by the Statute of Jeoffails, which by the 9 *W.* 3, c. 15, s. 55, and 6 *Anne*, c. 10, s. 21, are extended to all Courts of Record in this country.

As to the objection on the want of summons, the proceedings are stated to have been commenced by plaint, which is analogous to an original writ: *Hale v. Clare* (g). The want of an averment of the return of the plaint, assuming there was no return, is cured after verdict by 10 *Car.* 1, sess. 2, c. 12, s. 1; and the want of plaint cannot be alleged as diminution in error from an Inferior Court. The variance between the plaint and the declaration is also cured by the Statute of Jeoffails: *Feathers v. Bryan* (h); *Sayer v. Curtis* (i).

As to the objection that the affidavit and attachment are not in accordance with the statute; assuming that to be so, it is a mere irregularity, and not open to a party on writ of error: 2 *Saund.* 101, n.; *Andrews v. Lynton* (k); and the plea of *in nullo est erratum* is no admission of the want of an original or sum-

(a) *Freem.* 281.

(c) *Comb.* 398.

(e) 2 *Stra.* 1117.

(g) 1 *Salk.* 266.

(i) 1 *Wils.* 180, *note*.

(b) *Comb.* 426.

(d) 1 *Stra.* 641.

(f) 3 *Br. & B.* 1.

(h) 1 *Wils.* 180.

(k) 1 *Salk.* 265.

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mons : *Hudson v. Banks* (a); *Taylor v. Willans* (b). If after verdict it appears that the record recites a vicious original, yet if no original writ is to be found on the file, the Court will intend that there was once a good original, which is lost, and that the clerk has mistaken the recital of it, which after verdict is not material: *Redmond v. Edolph* (c). Having appeared and pleaded to these errors, they cannot now rely on them: *Thoroughgood v. Scrogs* (d).

As to the want of a venire and distringas, the Court will assume that all things were rightly done when there has been a trial and a verdict returned.

Then as to the bail-piece not agreeing with the statute; the statute prescribes no form, and the assignment of error is according to the form of the statute, which is clearly bad. The errors grounded on the variance between the summons in the plaint and the declaration are cured by 10 *Car.* 1, c. 12, and 6 *G.* 1, c. 6, s. 1.

As to there not being a sufficient award of a venire or jury process averred, that is answered by *Austen v. Mander* (e). If we show this form is analogous to that used in the Court above, the objection is met: *Ferg. Forms*, p. 159. And so the error assigning a want of continuance is answered by 33 *Hen.* 8, sess. 2, c. 3, s. 1.

*Macdonogh* replied.

If these variances were mere matters of form, they would be cured by the Statute of Jeoffails, but the omission of the summons is matter of substance: *Gilb. C. P.*, 135. This being a customary Court, the custom must not be exceeded. A summons ought still to issue, notwithstanding the provisions of the Municipal Act: that statute does not vary the mode of proceedings: *Pike's Precedents*. —[PERRIN, J. In point of fact the summons never issued, and the Legislature only did away with that fiction.]—Where the process is erroneous, no custom can authorise the proceedings under it:

(a) *Cro. Jac.* 28.

(c) 1 *Saund.* 318.

(b) 2 *B. & Ad.* 845.

(d) *Cro. Eliz.* 582.

(e) *Sir T. Raym.* 20.

*Williams v. Lord Bagot (a)*. Prior to the statute, no attachment issued until there was a return of *non est inventus*, and the statute does not alter that practice; and this being a customary proceeding, the statement of a summons is essential.

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BLACKBURN, C. J.

In this case several errors have been assigned, none of which in our opinion can be sustained. These errors divide themselves into three classes. The first class is grounded upon the want of any summons before the attachment. With regard to that objection, we think the Municipal Act has removed it; because it is plain from that statute 3 & 4 Vic. c. 108, s. 181, that a party may without any previous proceeding file an affidavit of the cause of action, stating that the same has accrued within the borough, and thereupon it shall be lawful for the Recorder or Mayor to issue an attachment. The next class of objections rests on the want of an averment of a distringas or jury process on the record; but the record says the jury were empanelled and sworn, and they are spoken of as the same jury throughout; it would therefore be strange to call on the Court to intend that no jury process issued, where there is an actual finding on which the Judge acted. The other objections appear to us to be cured by the Statutes of Jeoffails, which have been extended to this country, and include Courts of inferior jurisdiction.

(a) 3 B. & C. 772.

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## READ v. HATCH.

*June 4.*

To a declaration in assumpsit for work and labour, the defendant pleaded in abatement that at the time of the making of the promises he and certain other persons (naming them) were Commissioners for the time being of the town of A., appointed by virtue of 9 G.4, c. 82, and were acting in execution of the Municipal Act, and that the promises were made jointly by the defendant and the said other persons; that afterwards their term of office expired, and other persons (naming them) succeeded to such office, and now are the acting Commissioners and resident within the jurisdiction.

*Held*, a bad plea in abatement.

**ASSUMPSIT.**—The declaration contained a count for wages and salary as the hired servant of the defendant, as messenger and inspector of nuisances; a count for work and labour, and the money counts.

To this declaration the following plea in abatement was pleaded:

“And the said defendant, by his attorney, comes and defends the wrong and injury, when and soforth, and prays judgment of the said bill, because he says that at the time of the making of the said alleged promise in the said declaration mentioned, to wit, “on, &c., at, &c., the said defendant and divers other persons, to wit (naming them), were Commissioners for the time being of the town and borough of Ardee in the county of Louth, appointed by virtue of an Act made in the ninth year of the reign of King George the Fourth, entitled ‘An Act to make provision for lighting, cleansing and watching of cities, towns corporate and market towns in Ireland,’ in certain cases; and were also then and there acting as such Commissioners in and for the said borough, in pursuance and in the execution of an Act passed in the Session of Parliament held in the third and fourth years of the reign of her said Majesty Queen Victoria, entitled ‘An Act for the regulation of Municipal Corporations in Ireland;’ and that the said promise was then and there made by the said defendant, jointly with the said Commissioners (naming them), as such Commissioners as aforesaid, and not by the said defendant alone.”

And the said defendant further says that, “afterwards, to wit, “on, &c., at, &c., the said defendant, and also the said other Commissioners (naming them) completed their appointed term of office for the time then being, as such Commissioners as aforesaid, pursuant to the provisions in that behalf in the said first-mentioned

"Act, made in the ninth year of the reign of his said Majesty King George the Fourth, contained; and thereupon the said defendant and George Boylan, Anthony Smith, Felix Macdonald, Patrick M'Donnell, jun. and Edward Addy, and also Wellington Shegog and Thomas Bradley, together with certain other persons who have, and at the time of exhibiting the plaintiff's said bill had ceased to be such Commissioners, then and there being duly elected to supply the places of the said first-mentioned Commissioners, became and were, and the said George Boylan, Anthony Smith, Felix Macdonald, Patrick M'Donnell, jun., Edward Addy, Wellington Shegog, Thomas Bradley and this defendant, have ever since continued to be and now are Commissioners for the time being of the said town and borough, appointed by virtue of the said Act made in the ninth year of the reign of King George the Fourth, and acting as such Commissioners in and for the said town and borough, in the execution of the said Act for the regulation of Municipal Corporations in Ireland, and at the time of the exhibiting of the said bill were and still are respectively living and resident within the jurisdiction of the said Court, to wit, at Ardee in the county of Louth, to wit, at Dublin in the county of the city of Dublin; and this the said defendant is ready to verify. Wherefore inasmuch as the said George Boylan, Anthony Smith, Felix Macdonald, Patrick M'Donnell, jun., Edward Addy, Wellington Shegog and Thomas Bradley, as such Commissioners for the time being, jointly with the said defendant as aforesaid, are not named in the said bill together with the said defendant, he the said defendant prays judgment of the said bill, and that the same may be quashed and soforth."

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There was the usual affidavit to verify made by the defendant.

General demurrer to this plea, and joinder in demurrer.

*H. Smythe*, with whom was *Napier*, for the demurrer.

It is not necessary to demur specially to a plea in abatement; and if persons acting in an official capacity, such as churchwardens or Commissioners, employ individuals to do certain works, they are personally liable.

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*Smythe* was stopped, and the Court called on—

*Close*, in support of the plea.

The plea admits the defendant is jointly liable with others, all of whom it avers to be within the jurisdiction, so that it offers a clear remedy for the plaintiff. It is grounded on the 9 *G.* 4, c. 82; by the 11th section of that statute, residence is required as a qualification in the persons elected as Commissioners; and by the 15th section, the term is specified when the office is at an end, and its effect is to divert and transfer the property to the new Commissioners elected, to all intents and purposes. The new body becomes liable for the contracts of the previous Commissioners. Then the 29th section requires the Commissioners for the time being to appoint a treasurer and inferior servants for effectuating the purposes of the Act, and to apportion salaries and wages, and to pay such out of the moneys levied under the Act.—[BLACKBURN, C. J. If you had said by your plea you had not personally contracted, I could understand it; the plea should have been in bar, not in abatement, for if you are not personally liable, *non assumpsit* would have been a good defence.]—The 57th section gives a power to abate nuisances; and the 64th section enables the Commissioners to fine for nuisances; but the 31st section authorises the treasurer alone to receive the moneys, and prevents any single Commissioner meddling with them, for all payments and disbursements are to be made by the treasurer, on the order of the chairman, countersigned by the clerk of the board. The 32nd section gives a power to fine or dismiss servants for negligence or misconduct, and these fines are to be deducted from their wages. But the 62nd section prevents a change in the persons composing the body of Commissioners abating, staying, delaying or affecting any action; so that there is a plain remedy against the body, who having funds in their hands, are liable for the contracts of their predecessors. The office is a statutable one, and to enable the plaintiff to recover he should follow the statutable remedy. By 3 & 4 *Vic.* c. 105, s. 39, it is provided “That in all cases in which “after such plea in abatement, the plaintiff shall, without having “proceeded to trial upon an issue thereon, commence another action “against the defendant or defendants in the action in which such

"plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement, as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment (as the case may be) against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person, provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement." This was no debt of the defendant's as an individual, it was contracted jointly with others, for the purposes of the statute; and if he be held liable in his individual capacity, he cannot under the terms of the statute have any control over the funds; ceasing to be a Commissioner, he ceased to have any interest in the funds which would have satisfied the plaintiff's demand.

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It is only necessary to plead such facts as raise the legal liability, the matter of law need not be stated: *Steph. on Plead.*, pp. 392, 393. Public statutes must be noticed by the Court without their being stated in pleading, and it is sufficient to state facts which will appear to the Court to be affected by the statute; *Bac. Ab. Stat. L*; *Com. Dig. Pleader*, C; *The King v. Sutton (a)*; *Boyce v. Whitaker (b)*.

We have therefore alleged facts in our plea showing the official capacity of the defendant; that the contract with the plaintiff was made by the entire body of the Commissioners; that the office has ceased and his power become divested; that new Commissioners have

(a) 4 M. & Sel. 542.

(b) 1 Doug. 97.

T. T. 1847. been substituted, and that the title and liabilities are transferred:  
*Queen's Bench.* 3 & 4 Vic. c. 108, ss. 16, 93 and 108. The plea thus gives the  
 READ a plaintiff better writ and increased security, and it would be in-  
 v. equitable to hold the defendant individually liable where there is a  
 HATCH. remedy against the official body.

*Napier*, in reply, was not called on.

BLACKBURN, C. J.

This is an action by the plaintiff for wages or salary for services done by him as messenger and inspector of nuisances. The declaration represents the defendant as having personally contracted with the plaintiff; and it is admitted by the plea that he did personally contract, which at once puts an end to the argument that he is not personally liable. If the Act referred to protect him from personal liability, a plea in abatement is no defence; but if he be not liable, the plea of non-assumpsit would have been a good defence; but here, confessing he is personally liable, he says the contract was made with him and others jointly as Town Commissioners of Ardee. If the contract personally bind, it does so until it be discharged. There is no colour for the substance of this plea.

BURTON, J., concurred.

CRAMPTON, J.

If the defendant be personally liable, the plea is clearly bad; if he be not, he can defend himself under the general issue.

PERRIN, J.

This is a bad plea in abatement; we do not, however, decide that the defendant is personally liable.

Demurrer allowed, and judgment of *respondeat ouster*.

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THE MIDLAND GREAT WESTERN RAILWAY  
COMPANY OF IRELAND

v.

ISIDORE BOURKE.

June 4.

**DEBT.**—The declaration averred that the defendant, heretofore and at the time of the commencement of this suit, to wit, &c., was and now is the holder of certain, to wit, thirty, shares in the capital of the Midland Great Western Railway Company of Ireland, to wit, at, &c., and then and there was and still is indebted to the said Company in a large sum of money, to wit, the sum of £300, in respect of two several calls on said thirty shares, to wit, one call of the sum of £5 upon each of the said thirty shares, and one other call of the sum of £5 on each of said thirty shares, whereby, and by reason of the non-payment of said sum of £300, an action hath accrued to the said plaintiffs, by virtue of an Act of Parliament passed in the eighth year of the reign of her Majesty the Queen, chap. 16, entitled “The Companies Clauses Consolidation Act” (1845), and of another certain Act of Parliament, made and passed in the Session of Parliament held in the eighth and ninth years of the reign of her Majesty Queen Victoria, entitled “The Midland Great Western Railway of Ireland Act” (1845), to demand and have the said sum of £300 above demanded, yet the defendant hath not paid the said sum of £300, or any part thereof, to the plaintiffs’ damage of, &c., and thereupon they pray relief.

**Pleas.**—First, the general issue.

Secondly—*Actionem non*, because he says that he was not, before or at the time of the commencement of the said action, nor is, a holder of the said shares in the said declaration mentioned, or any of them, in manner and form as in and by the said declaration in

To a declaration for calls by a Railway Company, the defendant pleaded that he was not before or at the time of the commencement of the action, nor is, a holder of the shares in the declaration mentioned, or any of them, in manner and form as is in the declaration alleged; and further pleaded that the Company with others did fraudulently enter into a contract for a purchase of the Royal Canal, upon conditions inconsistent with the terms of their Act, and without any lawful authority; and that the calls were made for payment of that purchase and not for the purpose of the Railway. *Held* on demurrer, that such special pleading was bad, the defence amounting to the general issue.

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that behalf alleged; and of this he also puts himself upon the country.

Thirdly—*Actionem non*, because he says that after the time of the passing of the Midland Great Western Railway of Ireland Act (1845), and before the making of the calls respectively, the plaintiffs did fraudulently, and in collusion with others, enter into a contract for the purchase of the Royal Canal, upon conditions inconsistent with the terms of the Act, and without any lawful power or authority in that behalf so to do; and that after the making of said contract the plaintiffs did fraudulently, &c., make the said calls, for the purpose of paying thereout £400,000 as the purchase-money of said Canal, and not for the purpose of constructing the Railway.

Fourthly—As to the sum of £150, parcel of said sum of money above demanded, being the amount of the second of the said alleged calls, *actionem non*, because he says, that after the time of the making of the said Act, and before the making of the second of said calls, the plaintiffs, fraudulently intending to induce the defendant and others to become shareholders, did publish and declare that they would not proceed with the construction of said Railway further or otherwise than by making and working the Railway from Dublin to Belmont, a point three miles beyond Mullingar, and fifty-four miles from Dublin, under and by virtue of the said Act; and that by reason of such representations the plaintiffs called in the sum of £175,000, and that said sum of £175,000, together with the profits to be derived from the working of the Railway from Dublin to Belmont, is more than sufficient for working and maintaining the Railway when so made, and that no further sum is necessary to be raised by call or otherwise; and the said defendant so became a shareholder, believing that no further or other call could be lawfully made; and after becoming such shareholder, and before the making of the second of said calls, plaintiffs became purchasers of the said Canal on terms not consistent with the Act, and without any lawful power or authority so to do; and after they had become such purchasers and were possessed of said sum of £400,000, the plaintiffs, contriving to defraud the defendant and others, made the second of said calls for the purpose of making the Railway from Dublin to Belmont aforesaid, and therein defrauded the said defend-

ant, whereby he says said call is fraudulent and void. Similiter to the first plea. Special demurrer to the second plea, that it amounts to the general issue, and puts in issue matter not properly issuable, and that it does not confess and avoid the substantial matter in the declaration, and that it is argumentative, and that the facts are not positively alleged so as that a sufficient issue can be taken, and that they are not such as can be tried in this Court, and that the plea is inconsistent with the Lands Clauses Consolidation Act (1845).

Demurrer to third and fourth pleas, that there is no matter of fact in avoidance pleaded, but matter of law on which no issue can be taken, and that the matters stated are not properly triable by this Court.

Joinder in demurrer.

*George Orme Malley*, for the demurrer.

This action is brought under the 8 Vic. c. 16, s. 27, which enacts, "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the Directors who made such call, nor any other matter whatsoever; and thereupon the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period." Thus the conditions precedent which are rendered necessary to maintain this action are distinctly set forth, and also what constitutes a valid defence. The first of these conditions is, that the defendant, at the time of making such call was a holder, and without that preliminary proof the Company would be nonsuited at the trial; for the Act says, "thereupon the Company shall be entitled to recover;" so that

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under any circumstances, that proof is indispensable for the Company. There therefore was no necessity for the second plea, it does not narrow the issue; for if we took issue upon the fact of his being a holder, and merely proved the affirmative, it would not entitle us to recover, as the Act requires two other conditions precedent to be complied with: *Morgan v. Ruddock* (a). That was an action for an apothecary's bill, and the defendant pleaded non-assumpsit and a set-off, and at the close of the trial it was contended that the plaintiff should have proved he was a practising apothecary prior to 1815, or that he had obtained a certificate pursuant to the statute. The plaintiff said this objection should have been made by plea. The plaintiff was nonsuited. On motion for setting the nonsuit aside, several cases being cited, Patteson, J., says, "In the cases cited, the transaction on which 'the plaintiff's claim rested was illegal. The consideration was 'illegal, and the decision of the Court proceeded on such illegality. 'In those cases the Court decided that defendant should not be at 'liberty to give evidence of the alleged illegality without pleading it. 'In this case, however, it was not sought to prove any thing for the 'purpose of defeating the plaintiff's claim; but the objection is, 'that he did not prove something which the 55 G. 3 required he 'should prove in order to entitle him to recover. It (the 55 G. 3) 'has therefore made the proof of the practice or certificate a condition precedent to the plaintiff's recovery, and therefore he must 'prove it as part of his case. If I were to decide the defendant 'must plead such a matter, the decision would operate as a repeal 'of the Act of Parliament." But this plea amounts to the general issue: 1 *Chitty on Pleading*, p. 557, 5th ed. It is there said:— "Where the defence consists of matter of fact merely amounting 'to a denial of such allegations in the declaration as the plaintiff would, on the general issue, be bound to prove in support 'of his case, a special plea is bad, as unnecessary and amounting 'to the general issue; first, because such special plea, if considered as a traverse, tends to needless prolixity and expense, 'and is an argumentative denial, and a departure from the pre-

(a) 4 Dowl. P. C. 311.

“scribed forms of pleading the general issue; and secondly, if “viewed as a plea in confession and avoidance, it does not give “colour or a plausible ground of action to the plaintiff.” *Marsden v. Benson* (a); *Hayelden v. Staff* (b); *Edinburgh and Leith Railway Company v. Hebblewhite* (c). As to the third and fourth pleas, that the Company illegally purchased the Canal, they are equally untenable: *London and Brighton Railway Company v. Wilson* (d); *South Eastern Railway Company v. Hebblewhite* (e); *Aylesbury Railway Company v. Mount* (f).

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*Isidore Blake*, in support of the pleas.

The second plea differs from the general issue, because it raises the question whether an assignment of the shares previous to action brought does not exonerate the defendant from liability: *London Grand Junction Railway Company v. Freeman* (g). A person who takes shares is only liable if the Company be acting conformably with the statute incorporating them: *Wontner v. Shairp* (h).—[CRAMPTON, J. That was not an action on the statute for calls.]—The defence raised by the record here, and out of which the Court cannot go, is, that the Company have done certain things in a way not authorised by their Act.—[BLACKBURN, C. J. How could you go before a jury on these pleas? ]—They might have traversed the pleas, and thus a question would have been raised for the jury.

BLACKBURN, C. J.

The demurrer must be allowed. This action is brought under the Companies Clauses Consolidation Act (1845), and to sustain it, the plaintiffs must prove three things; first, that the defendant, at the time of making the call, was a holder of one or more shares in the undertaking; secondly, that such call was made; and thirdly, that

(a) 5 Law Rec. N. S. 22.

(b) 6 Nev. & Man. 659.

(c) 6 Mees. & Wels. 707.

(d) 1 Rail. Cas. 530.

(e) 2 Rail. Cas. 247; S. C. 12 Ad. & Ell. 497.

(f) 3 Rail. Cas. 469; S. C. 8 Scott, N. S. 586.

(g) 2 Man. & Gr. 606.

(h) 11 Jur. 373.

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such notice of the call was given as is directed by the Act. *Nil debet* would have put these matters in issue, and a special plea was therefore unnecessary.

Demurrer allowed.\*

\* Vide *The Shropshire Union Railway\* and Canal Company v. Anderm*, in the Joint Stock Companies' Law Jour. p. 108.

### JAMES MOORE v. DENIS MAGUIRE.

June 5.

Where in an action of debt for rent by the assignee of a reversion of a lease for lives renewable for ever, against the assignee of an under-lessee, the declaration averred that the reversioner

DEBT for rent on an indenture of demise, tried before Doherty, C.J., at the Armagh Spring Assizes of 1847.

The first count of the declaration stated:—"For that whereas  
"before and at the time of the making of the indenture of demise  
"hereinafter mentioned, one Elizabeth Cumming was seised in her  
"demesne as of freehold to her and her heirs for the term of two  
"lives, by virtue of a lease, to wit, a lease, originally for three

was seised in his demesne as of freehold to him and his heirs for the term of two lives, by virtue of a lease, originally for three lives, "and which said lease has been kept on foot and continued, and is still subsisting;" and that being so seised, the reversioner made the under-lease. *Held*, that such averment was sufficient, and that it was unnecessary to set out any of the renewals of the original lease, and that under the 5 G. 2, c. 4, such averment was sustained in evidence by the renewals, though the renewals showed that all the lives in the original lease had long dropped.

The declaration contained the usual averment, that all the under-lessee's interest came to the defendant by assignment, and the defendant by plea traversed the assignment; and the original lease contained a clause by which the head landlord reserved to himself a power to re-assume into his possession a portion of the demised premises, making a proportional abatement of rent; and the under-lease contained a proviso, that the under-lessee and his assigns should be bound by such clause; and the evidence to charge the defendant with the assignment was, that he had been in possession of all the premises in the under-lease, except the part which the landlord had taken possession of pursuant to the power, and had paid the rent reserved by the under-lease.

*Held*, that the issue was sufficiently sustained on the part of the plaintiff by such evidence, and that there was no variance.

The under-lease contained a clause subsequent to the reservation clause, in which the reversioner agreed to accept a reduced rent so long as the lessees, &c., should not build. The declaration claimed the larger rent, though it appeared on the evidence that the lessees, &c., had not built.

*Held*, that it was unnecessary to refer in the declaration to this agreement, and that there was no variance.

“lives, whereof two lives as aforesaid were in being, and which said  
 “lease has been still kept on foot and continued, and is still subsist-  
 “ing, of and in one undivided third part, the whole into three equal  
 “parts to be divided, of and in the tenements, with the appurtenances  
 “hereinafter mentioned to have been demised to Denis Caulfield,  
 “Samuel Reid and Thomas Greer; and one Mary Cumming was also  
 “then seised in her demesne as of freehold to her and her heirs for  
 “the said term of two lives, by virtue of said lease, to wit, said lease  
 “so as aforesaid originally for three lives, and whereof said two lives  
 “as aforesaid were in being, and which said lease has been still  
 “kept on foot and continued, and is still subsisting as aforesaid, of  
 “and in one other undivided third part, the whole into three equal  
 “parts to be divided, of and in the said tenements, with the appur-  
 “tenances hereinafter mentioned to be demised as aforesaid; and  
 “one Jane Cumming was also then seised in her demesne as of free-  
 “hold to her and her heirs for the said term of two lives, by virtue  
 “of said lease, to wit, said lease so as aforesaid originally for three  
 “lives, and whereof said two lives as aforesaid were in being, and  
 “which said lease has been still kept on foot and continued, and is  
 “still subsisting, of and in the other undivided third part of and in  
 “the said premises and tenements, with the appurtenances herein-  
 “after mentioned to have been demised as aforesaid, to wit, in the  
 “county of Armagh aforesaid; and being so seised as aforesaid for  
 “said term of two lives as aforesaid, they the said Elizabeth Cum-  
 “ming, Mary Cumming and Jane Cumming, afterwards, to wit, on  
 “the 22nd day of September, A. D. 1800, to wit, at, &c., by a certain  
 “indenture of bargain and sale then and there made between the  
 “said Elizabeth Cumming, Mary Cumming and Jane Cumming of  
 “the one part, and Denis Caulfield, Samuel Reid and Thomas Greer  
 “of the other part, the date whereof is a certain day and year in  
 “that behalf therein mentioned, to wit, the day and year last afore-  
 “said, they the said Elizabeth Cumming, Mary Cumming and Jane  
 “Cumming, for and in consideration of a certain sum of money, to  
 “wit, the sum of five shillings, to them then and there theretofore  
 “paid by the said Denis Caulfield, Samuel Reid and Thomas Greer,  
 “did bargain and sell all that three-fourth parts, the whole into four  
 “equal parts to be divided, of all that and those the fields on the

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"bank of the Canal, in said indenture of bargain and sale described, situate, &c.; to have and to hold the same unto the said Denis Caulfield, Samuel Reid and Thomas Greer, their executors, &c., from the day next before the day of the date of the said last-mentioned indenture, for the term of one whole year, &c.; by virtue of which said last-mentioned indenture, and by force of the statute, &c., they the said Denis Caulfield, Samuel Reid and Thomas Greer then and there became and were possessed of the said tenements, with the appurtenances, for the said term so to them thereof granted as aforesaid, the reversion thereof, with the appurtenances, belonging to the said Elizabeth Cumming, Mary Cumming and Jane Cumming; and the said Denis Caulfield, Samuel Reid and Thomas Greer being so possessed as aforesaid, and the said Elizabeth Cumming, Mary Cumming and Jane Cumming being so seised of the reversion as aforesaid, afterwards, to wit, on the 23rd day of September, in the year last aforesaid, at the place aforesaid, in the county aforesaid, by a certain indenture, to wit, an indenture of demise in the nature of a release, then and there made between the said Elizabeth Cumming, Mary Cumming and Jane Cumming of the one part, and the said Denis Caulfield, Samuel Reid and Thomas Greer of the other part, one part of which (*profert*), &c., they the said Elizabeth Cumming, Mary Cumming and Jane Cumming, for the consideration in said indenture of release mentioned, did demise, &c., unto the said Denis Caulfield, Samuel Reid and Thomas Greer, their heirs and assigns, the said demised premises, with the appurtenances; to have, &c., for and during a certain term yet to come and unexpired, to wit, a term of three lives, in the said indenture of release named and described, and the survivors and survivor of said three lives, and which said last-mentioned three lives were and are different lives, and each of them is a different life from the lives for which the said Elizabeth Cumming, Mary Cumming and Jane Cumming then held the said tenements and premises; yielding, &c., therefor yearly during the said term, to the said Elizabeth Cumming, Mary Cumming and Jane Cumming, their heirs, &c., the yearly rent of £47. 15s. 6d., of the then currency of Ireland, being equivalent to £45. 2s. of

"the present lawful money of, &c., by half-yearly payments on  
 "every," &c.

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The count then set out a covenant for payment of the rent, and that the lessees were to be subject to the clauses in the original lease from George Needham the lessor, particularly the clause for re-assumption; and that by virtue of said bargain and sale, the said Denis Caulfield, Samuel Reid and Thomas Greer, became and were seised in their demesne as of freehold of and in the said premises for said term of three lives.

It then averred that Elizabeth Cumming being seised as aforesaid, died so seised of and in the said reversion of and in her said one-third part or share of and in the said demised premises, the said one-third part or share being equivalent to three undivided ninth parts, the whole into nine parts to be divided, of and in the said demised premises, with the appurtenances; whereupon and whereby the reversion of and in the said third part or share of and in said demised premises, being equivalent, &c., then and there descended and came to the said Mary Cumming and Jane Cumming, the sisters of the said Elizabeth, and to George Stevenson, her nephew, who was the eldest son of Agnes Cumming, then deceased, another sister of said Elizabeth.

It averred the death of Mary and Jane Cumming, and that both their shares descended to George Stevenson, and that he was heir-at-law of the three sisters, and became seised of the reversion in said premises; and that being so seised, on the 3rd of December 1819, by bargain and sale between George Stevenson and the plaintiff, Stevenson sold the said reversion to plaintiff; and afterwards, on the 4th of December 1819, by indenture of release made between Stevenson and plaintiff, Stevenson assigned the said premises for £50 to plaintiff, to hold for the two lives for which Elizabeth Cumming, Mary Cumming and Jane Cumming were seised; and it then stated the meaning of the clause for re-assumption in the original lease, and averred that all the estate, right, title and terms of lives then to come and unexpired of them the said Denis Caulfield, Samuel Reid and Thomas Greer, in and to the said demised premises, with the appurtenances, by assignment and conveyance thereof then and there legally made, came to and vested in the defendant,

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who entered into the premises; that the term of three lives so granted to the said Denis Caulfield, Samuel Reid and Thomas Greer, is still unexpired, two of the three lives in said first mentioned indenture of release being alive and in being. It then stated that on the 1st of April 1825, the assignee of George Needham re-assumed a small portion of the premises, being at the rate aforesaid, to wit, the said rate of £3 late Irish currency per acre, equal to £2. 18s. 5d. of the new currency. It then averred performance by the plaintiff of all things in the lease of the 23rd of September 1800 on his part to be performed, and that since the assignment to defendant, and since the re-assumption, and during the continuance of the said term, and whilst plaintiff was so seised of the reversion, and defendant seised of the residue of said term, to wit, on the 1st of November 1846, a large sum of money, to wit, £446. 2s. 2d. of the late currency, equal to £411. 15s. 10d. of the present currency, became due for ten years' rent to the plaintiff, whereby an action had accrued, &c.

The second count differed from the first in averring the death of Elizabeth, Mary and Jane Cumming on the same day, the 1st of January 1810, and more generally deduced the title by stating that the reversion then descended on George Stevenson as the heir-at-law of each of them, and that he thereupon became seised of the same; it omitted any allusion to the clause of re-assumption as set forth in the first count.

The third count was for use and occupation.

Defendant pleaded *nil debet* to the whole declaration; secondly, to the first count, that he was not assignee of the estate and interest of Denis Caulfield, Samuel Reid and Thomas Greer; same plea to the second count, and the Statute of Limitations to the third count. Issue was joined on each plea.

At the trial, the plaintiff gave in evidence an indenture of demise of the 29th of October 1794, between George Needham of the one part, and Charles Seaver and Robert Cumming of the other part, whereby George Needham, for the considerations therein, demised, &c., to the said Charles Seaver and Robert Cumming all that part or field of ground in Drumolane, &c.; also a field adjoining them, lately in the possession of John Beath, and that part of Robert Seaver's

meadow which joined and extended from the east side of said two fields to the back drain of the New Canal, &c., to hold, &c., for the lives of his Majesty George the Third, his Royal Highness George then Prince of Wales, and his Royal Highness William Duke of Cumberland, and the survivors of them; and for and during the life and lives of such other person or persons as should be added thereto by virtue of a renewal thereafter to be made, according to the covenants and agreements thereafter mentioned.

The indenture contained a clause of renewal, and then this provision:—That in case the said George Needham, his heirs or assigns, should, at any time thereafter, have occasion for or deem it necessary to take into his or their possession that part of the said demised premises which fronted and joined the back drain of the New Canal, in order to build thereon, the said Charles Seaver and Robert Cumming did thereby promise and agree to surrender unto the said George Needham, his heirs or assigns, the said portion of said premises therein described; the said George Needham, his heirs or assigns, allowing unto the said Charles Seaver and Robert Cumming, their heirs or assigns, at the rate of £3 by the acre, for such quantity of the said ground as should be so taken from them.

The plaintiff then gave in evidence an indenture of demise of the 23rd of September 1800, between Elizabeth Cumming, Mary Cumming and Jane Cumming of the one part, and Denis Caulfield, Samuel Reid and Thomas Greer of the other part, whereby the said Elizabeth Cumming, Mary Cumming and Jane Cumming, for the considerations therein, demised, &c., to the said Denis Caulfield, Samuel Reid and Thomas Greer, in their actual possession, &c., their heirs or assigns, all that three-fourth parts, the whole into four equal parts to be divided, of all that and those the field on the bank of the Canal, in as large and ample a manner as the same were lately in the occupation and possession of the said Elizabeth Cumming, Mary Cumming and Jane Cumming, &c.; to have and to hold all and singular, &c., unto the said Denis Caulfield, Samuel Reid and Thomas Greer, their heirs and assigns, for and during the natural life and lives of Daniel Brady, Edward Greer and John Reid, and the survivor and survivors of them;

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yielding and paying, &c., the sum of £47. 15s. 6d. sterling, to commence from the 1st day of November then last past, &c., with the usual power of distress, if rent in arrear.

The indenture then contained a covenant to pay the rent, to keep in repair, and to deliver up possession on the determination of the demise, and this agreement followed:—"And it is hereby agreed by and between all the parties to this indenture, that "in case the said Daniel Caulfield, Samuel Reid and Thomas Greer, their heirs or assigns, shall not build or erect any "dwelling-house, warehouse or house to carry on any kind of "manufacture on said hereby demised premises, or any part "thereof, then, and in that case, the said Daniel Caulfield, Samuel Reid and Thomas Greer, their heirs, executors, administrators "and assigns, shall then only pay, or cause to be paid, unto the "said Elizabeth Cumming, Mary Cumming and Jane Cumming, "their heirs, executors, administrators and assigns, the yearly "sum of £23. 17s. 9d., in the place and stead of the said sum of "£47. 15s. 6d., during the continuance of this demise, above taxes; "the same to be paid and payable on the days and times herein- "before mentioned for the payment of the aforesaid yearly rent of "£47. 15s. 6d., with the like remedies of distress and re-entry in "case of non-payment of the same as hereinbefore mentioned."

There was then a clause that the said Denis Caulfield, Samuel Reid and Thomas Greer, and each of them, their, and each of their heirs, executors, &c., should be subject to all the agreements and covenants in the original lease from George Needham to Elizabeth Cumming, Mary Cumming and Jane Cumming, and particularly the clause for re-assumption by the said George Needham, his heirs or assigns, on the terms therein mentioned.

Plaintiff also gave in evidence an indenture of same date and between the same parties as the previous lease, which, after reciting that George Stevenson, then in the West Indies, was entitled to the other fourth of said premises, witnessed that the said Denis Caulfield, Samuel Reid and Thomas Greer, their executors, &c., on payment of the rent therein reserved to the said Elizabeth Cumming, Mary Cumming and Jane Cumming, should be dis-

charged and released of all claims of the said George Stevenson, provided that nothing therein contained should prevent George Stevenson from receiving the fourth of the said rents himself.

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Plaintiff then gave in evidence an indenture of lease and release of the 4th of September 1819, made between George Stevenson of the one part and James Moore of the other part, which recited the demise of the 29th of October 1764, and that his Royal Highness William Duke of Cumberland, one of the *cestui que vies* in the said lease named, afterwards died, and that Viscount Kilmorey, who became entitled to the reversion of the said demised premises expectant on the determination of the said lease, by deed or label, dated 1st of September 1811, for the considerations therein mentioned, on the application of the persons entitled to the benefit of said lease, inserted the life of the Duke of York in the place of the Duke of Cumberland, and that Lord Kilmorey had, in pursuance of the covenant in the original lease contained, taken into his possession a part of the said demised premises, and had made a rateable allowance for the same; and that by an indenture of the 23rd of December 1784, Charles Seaver, one of the lessees in said recited lease, had demised unto Robert Stevenson a part of the therein demised premises; and that George Stevenson had agreed to sell his estate and interest as heir-at-law of Robert Cumming, Mary Cumming and Jane Cumming, in the said first recited lease, and also as son and heir-at-law of Robert Stevenson. It witnessed that in pursuance, &c., the said George Stevenson granted, &c., to the said James Moore and to his heirs, &c., one moiety of land in all that and those this before-mentioned part or field of ground in Dromolane, to have and to hold, &c., for and during the natural lives and life of his then Majesty King George the Third, and of George the Prince of Wales, and Frederick then Duke of York, being the *cestui que vies* for which the said lands and premises were then held, and the survivors of them, and for such other lives as might be added thereto, subject to all the covenants in the second recited lease mentioned.

A renewal of October 1820 was then given in evidence, made

**T. T. 1847.** between Lord Kilmorey and James Moore, whereby it was witnessed  
*Queen's Bench.* that Lord Kilmorey demised, &c., unto James Moore, &c., the before  
 MOORE mentioned field of ground in Dromolane, &c., to hold for the lives  
 v. of George the Fourth and the Duke of York, and the Duke of  
 MAGUIRE. Cumberland, and the survivors of them, and such other lives as  
 should be added thereto.

Another renewal was also given in evidence, of the 16th of January 1828, between the same parties, whereby the life of her present Majesty was inserted in place of the life of the Duke of York.

The plaintiff proved that Daniel Brady and Edward Greer, two of the lives in the lease of the 23rd of September 1800, were still in being; that Denis Caulfield, Samuel Reid and Thomas Greer, and another person, as partners, held the entire of the four fourth-parts of the field on the bank of the Canal, mentioned in the lease of the 23rd of September 1800; that the rents thereof were paid to the Misses Cumming from 1802 until 1813; that Lord Kilmorey re-took possession of a portion of the said premises; but the partnership was dissolved in 1815, and that Denis Caulfield continued in possession of the premises until 1819, when he died. He proved payment of rent under the lease of 1764 of the premises up to the present time. Plaintiff also proved the death of George Setevenson in 1819, of Elizabeth Cumming in 1807, of Mary Cumming in 1814, and of Jane Cumming in 1819. He then produced a map of the premises, from which it appeared that the entire of the four-fourths of the premises mentioned in the lease of the 23rd of September 1800, was a moiety of the premises comprised in the indenture of the 29th of October 1764; that the portion re-assumed by Lord Kilmorey was one rood and thirty-two perches, and that the residue of the said four-fourths was two acres, two roods and eighteen perches.

Thereupon the Judge left it to the jury to say, if they believed the evidence, and were satisfied that the defendant was in occupation of all the premises except the part re-assumed by Lord Kilmorey, and had paid the rent reserved by the lease of 1800, that they might presume the defendant was in by assignment and

conveyance of the interest of the lessees in the lease of September 1800, and should find for the plaintiff on the first and second counts of the declaration, calculating the rent at the rate of £23. 17s. 9d. per annum, of the late currency, making an abatement for the part re-taken by Lord Kilmorey.

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To this defendant's Counsel objected, and contended that the evidence did not sustain the first or second counts of the declaration, and that the jury should find a verdict for defendant on the general issue on both counts.

They also objected that it did not appear by the evidence that the plaintiff was assignee of the reversion of the lease of September 1800 at the time of the accruing due of the rent; and that as he claimed the larger rent reserved by the lease of 1800, without reference to the clause for its reduction in the event of the lessee not building thereon, that there was a variance between the pleadings and the evidence; and that it had not been proved that the defendant was assignee of all the estate and interest in the demised premises, and that the learned Judge should direct the jury accordingly; this he refused, and the jury found for the plaintiff for £134. 9s. 5d.

A bill of exceptions had been prepared by the defendant's Counsel, but owing to the absence of the learned Judge who tried the case, his signature could not be procured within the time limited by the practice of the Court. An extension of time was obtained upon consent, but the defendant having again failed to obtain the signature of the Judge, the Court held him bound by his consent, and refused to extend the time further, but gave the defendant a conditional order for a new trial, allowing him to rely on the same grounds as those set forth in the bill of exceptions.

*Tomb and R. Andrews* showed cause.

This was an action of debt, on a lease, for rent thereby reserved, of which lease the defendant is the assignee. The objection made to the plaintiff recovering was this, that inasmuch as the title of the lessor accrued in 1800 on a lease for three lives, which lives had expired, there remained no reversion to enable him to maintain the

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action. But the fact was, that the original lease had been kept alive by renewals, and in the existing lease some of the lives are in being, though the lives in the original lease are gone. The 5 G. 2, c. 4, s. 4, enacts "That in case any leases shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons, in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants and duties, and have the like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands and tenements, in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had, in case the respective under-leases had been renewed under such new principal lease; any law, custom, or usage to the contrary thereof notwithstanding." The under-lessees are thus to enjoy the lands as if the original lease had been kept alive: *Dignum v. Palmer* (a). The object of the statute was to do away with the necessity of surrendering under-leases when a renewal was required.

*Tomb* was stopped by the Court.

(a) 2 F. & Sm. 306.

*Napier and Holmes*, with whom were *Joy* and *Donohoe*, contra.

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Our first objection is, that the plaintiff has not set out his title correctly. It is true the Act of Parliament gives the same rights and remedies to the reversioner, who has renewed his interest, against the under-lessees, as he would have had in case his original lease were actually subsisting; but that does not dispense with the necessity of setting out the renewals in his pleading, if it be necessary for him to rely on them in order to establish the continuance of his original interest. When, by setting out the renewals, he has shown upon his pleading that the original lease has been kept on foot and is still subsisting, then the Act of Parliament will apply, and his rights and remedies will be the same as under the original lease. But here the party cannot go out of his pleading. He states here a seisin in the lessor at the time of the granting of the under-lease, and then alleges that the lease under which the lessor was so seised has been kept on foot and is still subsisting, whereas it appears by the evidence that that interest was in fact determined long before the rent accrued due, by the death of the two lives in the original lease, as well as by the acceptance of the renewals. The reversion which they pleaded was thereby gone, for their case was that they had a reversion for the two lives in the original lease. There was no evidence to sustain the first and second count, as it appeared clearly that the reversion pleaded was gone. The doctrine of enlargement will not serve them, for although the statute contemplates a reversion to be in existence when the new lease is taken out, it by no means introduces the doctrine of enlargement: *Jack d. M'Guirk v. Reilly* (a). Besides the acceptance of the renewed lease was a surrender of the original lease: *Lyon v. Reed* (b); *Curtis and Andrews v. Spitty* (c). If they had stated in their declaration that a life having died, they obtained a renewal, then under the statute they would have a complete remedy to recover the rent; they should have stated their original reversion for two lives, then that a life dropped, and that afterwards they took out a renewal;

(a) 2 Hud. & Br. 307, n.

(b) 13 Mees. & Wels. 285.

(c) 1 Scott, 737; S. C. 1 Bing., N. C. 756.

T. T. 1847. but in their declaration they aver what is contrary to the fact, in  
*Queen's Bench.* averring that the original reversion was subsisting, for the lives  
 MOORE were dead, and the old reversion is not continued by the statute.  
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MAGUIRE. Our next objection is, that they go in their declaration for the larger rent, without noticing the agreement to accept a reduced rent in case the lessees should not build, &c. In fact the larger rent was to become payable only in the event of the lessee's building.—[CRAMPTON, J. Why then not have pleaded *non est factum*, and relied on the variance?]*—Nil debet* answers as well; they should have established that we did something to entitle them to the larger rent: *Vavasour v. Ormrod* (a).

In the declaration it is alleged that all the estate and interest of the original lessees vested in the defendant by assignment; whereas on the evidence it clearly appears that a portion of that interest had been resumed by the head-landlord while the lessees were still in possession. They proved no assignment to us, but merely that we were in possession of a portion of the premises demised to the lessees; whereas the issue raised by our traverse of the assignment, and which they are bound to establish was, that we were assignee of the entire.

*Andrews* replied.

BLACKBURN, C. J.

The pleadings in the present action are in the proper form. There are two questions in the case. In 1794 certain premises were demised by the ancestor of Lord Kilmorey, which premises afterwards became vested in three persons, by lease bearing date in 1800. The original lease was for three lives, and contained a covenant for renewal. It also contained a covenant that the lessor should at any time he pleased re-assume possession of a portion of the demised premises, upon certain terms therein stated. The lease of 1800 was made for different lives from those in the original lease, subject to the rent of £47. 15s. 6d., and which is the rent for which the cove-

(a) 6 B. & Cress. 430.

nant to pay was entered into. The lease was made subject to the right of re-assumption, by Lord Kilmorey and his heirs, and the lessee took it subject to that right in Lord Kilmorey to abridge the estate by re-assumption of part. The plaintiff has declared as assignee of the reversion, and he avers that that reversion still continues; that is the substance of his allegation, and what he was bound to prove.

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Lord Kilmorey, it seems, did exercise his right of re-assumption in 1807, by which the quantity of the estate of the lessee was diminished; and after that the defendant became assignee.

On these facts, then, arise the question; first, whether the evidence substantially supports the averment of the identity of the reversion? That depends on the construction of the statute 5 G. 2, c. 4, and is no longer a matter of doubt; for it is concluded by the judgment of this Court in *Dignum v. Palmer*. The averment has been substantially proved by the renewals, and there never was a time when the lessees had not an estate agreeable to the lease of 1794. The estate existing in 1800 has been kept on foot and is continuing; the relation remains unbroken, and the substance of the averment is the continuance of the estate.

But secondly, it is said the defendant is assignee of only part; if that were so, the case of *Curtis v. Spitty* would apply. It is true he is not in possession of all that was demised by the lease of 1800; but he has all that it was possible for him to be in possession of—all that he was capable of being assignee of. Then the *reddendum* is to pay £47. 15s. 6d., and there is an absolute covenant to pay that rent, which is declared for accordingly; but by agreement that rent is reduced. How does the fact differ from the averment in the declaration? The objection confounds an objection on the ground of variance with one of a different kind. The right to recover depends on the evidence given at the trial, and the subsequent clause in the lease reducing the rent has operation by giving to the defendant the benefit of that provision if certain things occur. We are of opinion the cause must be allowed, with costs.

Cause allowed with costs.

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MICHAEL BUTLER

v.

CHARLES BIANCONI and others.

June 5.

In a plea justifying trespass under process of an Inferior Court, it is not enough to state that the defendant levied his plaint for a cause of action arising within the jurisdiction of such Court; the plea should also show that the trespasses complained of were committed within the jurisdiction.

**TRESPASS.**—The declaration contained a count for breaking and entering the plaintiff's house in Cashel, and seizing and taking his goods; the second count alleged the trespass in an aggravated form, and the third count was *de bonis asportatis*.

The defendants pleaded the general issue; secondly, as to the breaking and entering of the said dwelling-house and messuages in the said first and second counts, &c., and in which, &c., and making a great noise and disturbance therein respectively, and staying and continuing therein respectively, and making and continuing the said noise and disturbance therein respectively for the said space of time respectively mentioned, and therein seizing and taking the said goods and chattels in the said first and second counts respectively mentioned, and carrying away the same, and keeping and detaining same, and also as to the seizing and taking and carrying away the goods and chattels as in the said last count of the said declaration mentioned above supposed to have been done by the said, &c., *actionem non*, because they say that they the said, &c., before the time when, &c., to wit, on, &c., at Cashel, to wit, at Clonmel aforesaid, in the Court of Record of our Lady the now Queen, held before the Mayor and Recorder of the city of Cashel, at a certain Court held before the said Mayor and Recorder, they the said defendants levied their plaint against the said Michael Butler, in a certain plea of trespass on the case on promises, for a cause of action arising within the jurisdiction of the said Court, and thereupon such proceedings were had in the said Court, that afterwards, to wit, on the day and year last aforesaid, a precept issued by said Mayor out of the said Court to Thomas Connor and James Doherty, then and there being serjeants-at-mace, and bailiffs of the said Court, and then and there being the

officers of the said Court in that behalf, commanding them to attach the said Michael Butler by his goods, so that they might have him the said Michael Butler at the next Court to be holden before the said Mayor and Recorder, to answer the said Charles Bianconi and Richard Keatinge, and which said last mentioned precept was then and there delivered to the said serjeants and bailiffs for execution thereof, and by virtue whereof the said serjeants and bailiffs, and they the said Charles Bianconi and Richard Keating, as their assistants, and by their command, afterwards, to wit, on, &c., in execution of the said precept, peaceably and quietly entered the said dwelling-house and the messuage in said counts respectively mentioned, and attached the goods of the said Michael Butler, and committed the said several trespasses in the introductory part of this plea mentioned, as they lawfully might for the cause aforesaid; and the said defendants further say that they afterwards, at the next Court holden by the said Mayor and Recorder as aforesaid, came and offered themselves against the said Michael Butler, but the said Michael Butler came not, and the said serjeants and bailiffs returned that they had attached the said Michael Butler by his goods, and that such goods remained in their custody, which are the said several trespasses in the introductory part of the plea mentioned, and whereof the plaintiff hath above complained. *Verification.*

The third plea averred the plaint to have been levied by Charles Bianconi alone. The fourth plea averred the plaint to have been levied by Charles Bianconi at a certain Court held before the Recorder of the city of Cashel, at a certain Court.

Special demurrer to the second plea, so far as it relates to the first count, that it is not shown by the plea how, or by what authority the supposed Court of Record in the said plea mentioned is held or constituted, or whether the same is held by prescription or patent, or the amount, or the extent of the jurisdiction; that it does not appear that the amount for which said supposed plaint was levied was within or not exceeding the jurisdiction of the said Court; that it does not appear that the Mayor and Recorder were the proper Judges of said Court, or either of them, or had power to preside therein or hold the said pleas thereof, or that the Mayor and Recorder

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der were at the time of the levying said plaint or the issuing of said precept the Mayor and Recorder for the time being of the said city of Cashel, and that their names are not set forth; that there was no summons issued on the plaint precedent to the issuing of the precept; that it does not appear except by inference that the Court was held within the jurisdiction, or that the precept issued under the seal of said Court; and that the plea was double, that it assumed the trespasses to be the same. The same causes of demurrer were assigned to the other pleas; and as to the second plea, so far as it relates to the second count, *nul tiel record* of the said supposed plaint and proceeding; and as to the third plea, so far as it relates to the second count, *nul tiel record*; and so as to the fourth plea, so far as it relates to the third count, *nul tiel record*; and as to the second plea, so far as it relates to the third count, *de injuriâ*.

Joinder in demurrer—and as to the replication *nul tiel record*, rejoinder that there is such a record.

*Francis Meagher*, in support of the demurrer.

*Rogers v. Browne* (a) is an express authority in favour of this demurrer; for assuming that the Court at Cashel has a limited jurisdiction, yet the pleas have been framed so as to avoid showing what that jurisdiction was, or that the debt claimed was within the amount that could be recovered within its particular jurisdiction; and there is not the slightest allegation that the Mayor and Recorder were the Judges of the Court.

*Meagher* was stopped by the Court, and—

*Loughnan* and *George*, in support of the pleas, were called on.

It sufficiently appears on the pleadings that these goods were taken within the jurisdiction, for the venue is laid in Cashel, the declaration alleging the entry to have been in the plaintiff's house at Cashel, and the plea sets out the cause of action as arising within the jurisdiction of said Court at Cashel. In *Rogers v. Browne*, one of the pleas was similar to the present, in averring that "The

(a) Hayes R. 487.

“defendants levied their plaint against the plaintiff in a certain  
 “plea of trespass on the case on promises, for a cause of action  
 “arising within the jurisdiction of said Court.”—[CRAMPTON, J.  
 Would plaintiff or defendant be bound by the words “at Cashel”  
 at the trial?—PERRIN, J. Cashel does not necessarily mean the  
 city of Cashel.]—In another of the pleas in *Rogers v. Browne*, the  
 averment of being within the jurisdiction was omitted; the special  
 causes of demurrer here assigned are concluded by that case, and  
 therefore the general ground of demurrer is relied on, that the  
 taking is not alleged to have been within the jurisdiction. In  
*Belk v. Broadbent and Wife* (a) the cause of action was not set  
 forth in the pleas: *Pitt v. Knight* (b). “So in pleading the judg-  
 “ments even of Inferior Courts, whether of record or not, it is now  
 “held not to be necessary to set out the cause of action, or that the  
 “defendant became indebted within the jurisdiction of the Court;  
 “but it is sufficient to say, that at a certain Court, &c., held, &c.,  
 “A B levied his plaint against C D in a certain plea of trespass on  
 “the case on debt, &c., for a cause of action arising within the  
 “jurisdiction of the Court, and thereupon such proceedings were  
 “had,” &c.: *Rowland v. Veale* (c).

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BLACKBURN, C. J.

This is a plain case. The action is one of trespass, against  
 the defendants, for breaking and entering the plaintiff's house in  
 Cashel, and taking his goods. The defendant Boyd pleaded a justi-  
 fication, founded on a process of a Court of limited jurisdiction.  
 Two things were necessary and essential to support that plea:—  
 First, that the cause of action was within the jurisdiction; that is  
 sufficiently shown: but further, the trespasses complained of should  
 also have been shown to have been within the jurisdiction; just as a  
 Sheriff would be bound to show that he acted within his bailiwick,  
 if he were justifying in trespass in the Superior Courts. In this  
 case the defendant does not allege that the taking was within the

(a) 3 T. R. 185.

(b) 1 Saund. 91, *note*.

(c) Cowp. 18.

T. T. 1847. jurisdiction, nor does he allege that he had jurisdiction to do the  
*Queen's Bench.* acts complained of. It is a mistake to suppose that the previous  
 BUTLER averments in the declaration would aid or induce a presumption  
 v. that the taking was within the jurisdiction.  
 BIANCONI.

Demurrer allowed.

J. T. TENNANT

v.

THE MAYOR AND BURGESSES OF THE BOROUGH  
 OF BELFAST.

June 10.

This Court has  
 no jurisdiction  
 to review the  
 taxation of  
 costs by the  
 Master under  
 the Lands  
 Clauses Con-  
 solidation Act  
 (1845), 8 Vic.  
 c. 18, s. 52.

J. D. FITZGERALD (with whom was *M'Mechan*) moved that it be referred to the Master of the Court to review the taxation of a bill of the costs of an inquisition, held to assess compensation for certain tenements, the property of the plaintiff, taken by the Town-council of the borough of Belfast, under a local Act, and to allow therein the costs of a previous notice of inquisition, which had proved abortive at the time fixed, and had never afterwards taken place. The 8 Vic. c. 18, s. 52, directs "the costs of any such inquiry shall in case of difference be settled by one of the Masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges and expenses incurred in summoning, empanelling and returning the jury, taking the inquiry, the attendance of witnesses, the employment of Counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry."

The notices to treat required by that statute were served on Mr. Tennant, and notice of the inquisition being given, Counsel and solicitor attended on his part, and the inquiry was gone into in reference to these premises. This was in July. An adjournment took place till October, and a second adjournment till December.

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It is contended on the part of the Town-council that we are not entitled to the costs incident to our attending in July, and the officer has held that he can only grant us the costs of the inquiry when the verdict was had.—[PERRIN, J. What have we to do with the matter?—BLACKBURNE, C. J. There is no proceeding in this Court to give us jurisdiction.]—The Court has an inherent jurisdiction over its own officer, and by that 52nd section jurisdiction is given to the Master of this Court.—[BLACKBURNE, C. J. You are calling upon us to say that by construction there is an appellate jurisdiction given.—PERRIN, J. The Master is not the officer of this Court for taxing.]—But he is a constituent part of the Court, and being so, there is a right of appeal from the decision of the officer to the Court.—[PERRIN, J. Suppose we directed the sums he has disallowed to be charged, could the applicant recover them under the Act of Parliament?—We contend that the officer should review his taxation in this way; he is the officer of the Court for the purpose of conducting its civil business. 1 & 2 G. 4, c. 53, is unrepealed, and the 63rd section of that statute provides, that “the proceedings, report or decision of such officer upon such account, inquiry or other matters whatsoever, shall be subject to the order, direction and control of the Court in all respects as heretofore:” *Gravatt v. Hall (a)*.—[BLACKBURNE, C. J. The appeal there was given by Act of Parliament; it was a case of setting off the costs of different actions.]—But the Court will review the decisions of the officer.

*Napier* (with whom was *Meade*) contra, was not called on.

BLACKBURNE, C. J.

We are asked, by the application made in this case, to review certain things done by the Master, no appeal being given to this Court by the Act of Parliament referred to; and thus constructively we are called on to perform a duty which has been imposed on the officer. That duty is thrown on him, not as the officer of the Court, but under the specific directions of that Act of Parliament. The Court have no jurisdiction, there being neither matter nor cause in Court.

No rule.

(a) Q. B. 25 Law Jour. 352.

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*Queen's Bench.*

In re SCULLY

v.

THE GREAT SOUTHERN AND WESTERN RAILWAY  
 COMPANY.

Nov. 16.  
 1848,  
 Jan. 19.

This Court will not grant a mandamus to the Master of this Court, commanding him to review his taxation of costs under the 8 Vic. c. 18.

WALL, on behalf of the Great Southern and Western Railway Company, applied for a mandamus to be directed to the Master of this Court, to review his taxation of a certain bill of costs against the Company; he referred to *Regina v. Sheriff of Warwickshire (a)*.

A conditional order having been granted—

Jan. 19.

*Brewster* showed cause against the rule.

*Fitzgibbon* and *Wall*, in support of the rule.

CRAMPTON, J.

There never was a case where the Court issued a mandamus to its own officer.

*Per Curiam.*

Allow the cause.—No costs.

(a) 2 Rail. Cas. 661.

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NOTE.—The Master does not act as the officer of this Court in taxing costs of this description; he acts under the statutable authority given by this particular Act of Parliament, and in some respects the case of *Magawley v. The Attorney-General* (Ir. Cir. Cas. 725) is analogous. That was a case where a statute conferred a new jurisdiction and was silent as to the right of appeal, and it was held *per TORRENS, J., and BURTON, J.*, that no appeal could be maintained. The framers of the Lands Clauses Consolidation Act, in referring the costs under the statute to be taxed by the Master of the Queen's Bench, have done so under a misconception of the duties of that officer in Ireland. In England the Masters of the Queen's Bench are the authorised and proper taxing officers of the Court, in this country there are other special officers for the purpose of taxation.

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*Queen's Bench.*

## KENNEDY v. M'KILLOP.

June 10.

MOLYNEAUX moved that the Sheriff of the county of Antrim do amend his return to a writ of *feri facias* made in this cause. The Sheriff, instead of making the return that is usual in this country—namely, that the within named J. M. had not, at the time of the delivery of the within writ to him directed, or at any time since, any goods or chattels, has returned that the within named J. M. *has* not any goods. The return is also informal in this, that the Sheriff has not endorsed on the writ the time he received it.

The ordinary form of a Sheriff's return in this country must be adopted.

This return is quite irregular: *Cowper v. Cullinane* (a); *Pearce v. Lord Charleville* (b).

*Macdonogh*, contra.

This is a return of *nulla bona*, and good both in substance and form; and is in the form adopted in England.

*Per Curiam.*

The practice in this country requires the form as stated by Mr. *Molyneaux* to be adopted; and as this return is against that practice, we must grant the motion with costs.

(a) C. P. 6 Ir. Law Rep. 98.

(b) 8 Ir. Law Rep. 223.

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*Queen's Bench.*

COSTELLOE v. HOOKS and BOYD.\*

Nov. 7, 8.

In a Manor Court of limited jurisdiction a summons is the proper mode of proceeding to compel an appearance, and the issuing an attachment is illegal and contrary to the policy of the Manor Court Code.

TRESPASS.—The declaration contained the ordinary count in trespass, for seizing goods of the plaintiff and detaining same, whereby plaintiff lost the use thereof, and the same became greatly damaged and lessened in value.

The second count was *de bonis asportatis*.

The defendant Boyd pleaded not guilty; secondly, as to the seizing and taking the goods and chattels of the plaintiff in the first count of the declaration mentioned, and carrying away and keeping and detaining the same as in the said first count mentioned; and also as to the seizing, taking and carrying away the goods, chattels and effects of the said plaintiff in the said second count of the said declaration mentioned, *actionem non*; because he says that heretofore and before and at the time of the accruing of the cause of action and levying of the plaint for the same hereinafter next mentioned, the lordship and manor of Newry in the several counties of Armagh and Down was hitherto, hath been and still is an ancient lordship and manor, with a Manor Court and office of Seneschal belonging thereunto, of which said manor he the said John Boyd, during all the time aforesaid was hitherto, hath been and still is the Seneschal; and in that behalf duly nominated and appointed to and lawfully possessed of the said office. And, that during all the time aforesaid, there was hitherto, hath been and still is a certain Court holden before the said John Boyd as such Seneschal as aforesaid, at the Sessions-house of Newry aforesaid, within the said manor, to wit, the Manor Court aforesaid, from three weeks to three weeks, therein holden before the Seneschal of the said manor, with power in the said last-mentioned Court to hold pleas of all and singular actions and trespasses, covenants, accounts,

\* This case is printed out of its order, as it involves a question of immediate practical importance.

contracts, detinues, debts and demands whatsoever, not exceeding the value of one hundred marks Irish, as well in debts as in damages, happening, arising, committed or perpetrated within the said manor or lordship of Newry, together with full power and authority in any action brought or commenced in the said Court for any such cause of action as aforesaid, so happening, arising, committed or perpetrated within the said manor or lordship of Newry, to award process in that behalf under the hand and seal of him the said defendant as Seneschal thereof, for the purpose of enforcing the appearance of the defendant in such action at the said last-mentioned Court, so holden within the said manor or lordship of Newry, to answer the suit of the plaintiff in such action, and proceed therein according to the course of the said last-mentioned Court. And the said defendant further says, that before any or either of the said times when and soforth, and whilst the said defendant was such Seneschal as aforesaid, to wit, on the 22nd day of July in the said year of our lord 1847, at Newry in the said county of Down, the said Michael Hooks came into the said last-mentioned Court before the said defendant as such Seneschal as aforesaid, and then and there levied his certain plaint against the said plaintiff before the said defendant as such Seneschal, in a certain plea of trespass upon the case for a cause of action personal, arising within the jurisdiction of the said last-mentioned Court, to the damage of the said Michael of a certain large sum, to wit, the sum of £1. 10s., wherein the said Court, and said defendant, as such Seneschal as aforesaid, then and there had jurisdiction to proceed in the prosecution thereof: and the said Michael then and there in the said last-mentioned Court found pledges to prosecute the plea aforesaid, and prayed process thereon, and which was then and there granted against the said plaintiff, who then and there was resident within the said manor and jurisdiction as aforesaid; and such proceedings were thereupon had that afterwards, at the said Court and before the said defendant as Seneschal as aforesaid, to wit, on the 12th day of August in the year of our Lord aforesaid, the said defendant, at the prayer and request of the said Michael, did then and there award, and thereupon then and there in due form and

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course of law was issued process of attachment under the hand and seal of him the said defendant, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, and then and there directed to one Joshua Byron, who then and there was the marshal and bailiff of the said Court and of the said manor and lordship of Newry, and to one Alexander Montgomery, who then and there was the assistant of the said Joshua Byron in his said office of marshal and bailiff, whereby the said defendant required the said Joshua Byron and his said assistant to attach the said plaintiff by her goods and chattels, if found within the said manor or lordship of Newry, so that she be and appear at the then next Court to be holden as aforesaid, by and before him the said defendant as such Seneschal as aforesaid, at the Sessions-house in Newry aforesaid, within the said manor and lordship of Newry, and answer the said suit of the said Michael in the plea aforesaid; and which said process was then and there delivered to the said Joshua Byron, who then and from thence, and at and after the return of the said process of attachment, was and still is such bailiff and marshal as aforesaid, to be executed in due form of law; by virtue of which said process of attachment, he the said Joshua Byron, so then and there being such marshal and bailiff as aforesaid, afterwards, and before the return of the said process of attachment, then and there, and within the said manor and lordship of Newry, and within the jurisdiction of the said Court, in execution of the said process of attachment, attached the said goods and chattels of the said plaintiff, in the said first and second counts of the said declaration mentioned, and detained the same, as it was lawful for him to do for the cause aforesaid; and thereupon at the then next Court holden as aforesaid, before the said John Boyd as such Seneschal of the said manor and lordship of Newry, to wit, on the 2nd day of September in the year last aforesaid, and before the said process of attachment was returned as aforesaid, came the said Michael and offered himself against the said plaintiff in the plea aforesaid, but the said plaintiff came not, and did not thereupon appear at the said last-mentioned Court so holden as aforesaid, but therein made default, and the said marshal and bailiff of the said lordship and manor of Newry,

then and there returned that he had attached the said plaintiff by her said goods, of the value aforesaid, and that the same then and there remained in his custody to be dealt with according to law, as by the record of the said proceedings still remaining in the said Court within the said manor and lordship of Newry, before the said defendant John Boyd, as such Seneschal as aforesaid, at Newry, aforesaid, in the county of Down, aforesaid, will more fully appear; which are the same supposed trespasses in the said declaration and introductory part of the plea mentioned, and whereof the said plaintiff hath above complained as aforesaid. *Verification, &c.*

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Third plea—*Actionem non* ; because he says that on the 22nd of July 1847, at Newry aforesaid, at a certain other Court of said manor holden before defendant as Seneschal thereof, the said Michael Hooks came before him and levied his plaint in a plea of debt, within the jurisdiction of said Court, and by his affidavit made before said defendant as such Seneschal, swore that plaintiff was justly and truly indebted to him in the sum of thirty shillings, and that said debt was contracted within the said manor and within the jurisdiction of said Court ; and that on the 18th of August, 1847 the defendant as such Seneschal issued his precept to Joshua Byron the marshal and bailiff of said Court, and to Alexander Montgomery his assistant, to attach the plaintiff by her goods, so that she should appear before the said Seneschal on the then next Court-day, viz., the 8th of September, at the Sessions-house, Newry, to answer said suit of said Michael Hooks ; which precept was delivered to said marshal for execution, by virtue whereof he attached the plaintiff's goods and detained them, and at the next Court, viz., the 8th of September, at Newry aforesaid, the said Michael Hooks offered himself against the plaintiff in the plea aforesaid ; but the plaintiff did not appear, and the said marshal and bailiff then returned that he had attached the plaintiff by her goods, and that same remained in his custody.

Replication. Similiter to the general issue.

And as to the second plea, *precludi non* ; because she saith that the cause of action in the second plea mentioned did not exceed

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five pounds, but was for less, viz., for thirty shillings; and that no summons or process in the name of the Seneschal or of the Steward of said manor was served on plaintiff, or at her usual place of abode, or at all. *Verification.*

As to the third plea; general demurrer.

Special demurrer to the replication, that plaintiff hath not by said replication to said second plea traversed or denied any of the material facts contained in said second plea; and that same is no answer to said second plea; and also that she hath thereby tendered an issue on a matter of fact not alleged, traversed or denied by defendant's said second plea; and that she thereby attempts to put in issue mere inference and matter of law, viz., whether any summons or process in the name of the Seneschal or Steward of said manor was served on the plaintiff, or at her place of abode, or at all; the replication admitting all the facts relating to said plea of trespass on the case; and that same is otherwise informal and insufficient.

Joinder in demurrer on the third plea, and general joinder by plaintiff.

*John Perrin*, with whom was *Tomb*, for the plaintiff.

The third plea is bad, because it merely states that at Newry, at a certain other Court of said manor, holden before defendant, the plaint was levied; it should have alleged that the cause of action was within the jurisdiction of the Court: *Cook v. M'Pherson* (a); *Chitty v. Luxford* (b); *Rogers v. Browne* (c); *Butler v. Bianconi* (d).—[CRAMPTON, J. The demurrer is a general one to the third plea.—MOORE, J. That plea does not aver that the attachment was executed within the jurisdiction.]—The question, however, is on the second plea, and substantially is, has the Seneschal of the manor of Newry power to issue an attachment to compel an appearance in a case like the present? It must be taken that no summons was served, and how then can proceedings in this Court of limited jurisdiction afford a justification for a trespass? The statutes

(a) 8 Q. B. 1030.

(c) *Hayes* R. 487.

(b) 3 Ad. & El. 319.

(d) *Ante*, p. 286.

regulating Manor Courts in Ireland preclude any such conclusion; 25 G. 3, c. 44, s. 1, limits the jurisdiction of these Courts, and provides that, "It shall and may be lawful to and for the several "Seneschals and Stewards of manors within this kingdom, except in "the county of Dublin, or the county of the city of Dublin, in all "cases of *debt, assumpsit* and *insimul computassunt* not exceeding "the sum of £10, and in all cases of *quantum meruit, trover, trespass* or *detinue* not exceeding the sum of £5, and within the sum "to which the jurisdiction of the said several Manor Courts were "respectively limited by the grants and charters under which the "said respective Courts are held; and where the cause of action shall "arise within the jurisdiction of the said Courts, upon application "for that purpose, to issue, or cause to be issued, a summons or "process in the name of such Seneschal or Steward, returnable to "the next Court to be held by such Seneschal or Steward within "such manor, provided that there shall be seven days between the "day of such service and such Court-day," &c. The 2nd section empowers Seneschals to summon juries, and the 3rd section provides, that after proof upon oath before such Seneschal and Steward of the legal service of such summonses or processes upon or at the defendant's place of abode, the same being within the manor, they are required, without any formal pleadings or other proceedings than such as are by law directed with respect to civil bills, to proceed to try and inquire into and determine the matter complained of, upon examination of witnesses, and make a decree upon the verdict, and to issue an execution thereon returnable on the next Court-day, &c., against either the body or goods of the defendant, at the election of the party, &c., provided that no such execution shall issue against the body of either plaintiff or defendant unless such Court be authorised by the charter creating the same to issue such execution.

Then the 9th section, after providing for the fees to be paid on the several proceedings, has this saving:—"That nothing herein "contained shall extend or be construed to extend to abridge the "jurisdiction of any Manor Court having jurisdiction to hold pleas "for greater sums than the sums hereinbefore mentioned, or to

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"restrain such Court from proceeding in causes exceeding the sums hereinbefore mentioned, according to the ordinary rules of law." The 7 G. 4, c. 41, extends the provisions of that 25 G. 3 to all Manor Courts in Ireland, and the 3rd section gives the form of proceedings: "That, in all cases where any complaint or application shall be made to the Seneschal or Steward of any Manor Court, such Steward or Seneschal shall, and he is hereby authorised, empowered and required to issue, or cause to be issued, a summons or process in the name of such Seneschal or Steward, to the person or persons complained against, requiring such person or persons to appear at the next Court to be holden by such Seneschal or Steward within such manor, on any day not less than seven days next after the date of such summons, and expressing the names of the parties plaintiffs and defendants, the cause of action, and the day and place of appearance," &c. This provision is compulsory on Stewards and Seneschals. Then the 7 & 8 G. 4, c. 59, s. 1, provides, "That, in all cases where the sum sought to be recovered under the said Act (7 G. 4, c. 41,) shall exceed £10 and shall not exceed the sum of £100, the summons or process which shall be issued in the name of the Steward or Seneschal of the Manor Court to the person or persons complained against shall be served upon such person or persons upon some day not less than seven days before the day appointed for the appearance of such person or persons," &c.; and if such summons be not served, the proceedings are to be void. Then the 6th section of the same Act is conclusive as to the construction of the statutes, for it enacts, "That, in cases where the jurisdiction of any Manor Court or Courts, with respect to the recovery of any sum or sums of money, shall not be limited to any specific amount by the grants or charters, or other authority under which any such Court or Courts may be respectively held, it shall and may be lawful for such Court or Courts, and for the Seneschal, Steward and Registrar of any such Court or Courts, to proceed for the recovery of any sum or sums of money exceeding £10, in such manner and method, and by such process as such Court, or the Seneschal or Steward, or Registrar, and other officers of such Court, might

"have done at any time before the passing of the said recited Act  
 "of the last Session of Parliament," &c. Thus the process of  
 attachment is limited to causes of action exceeding £10. The  
 2 & 3 Vic. c. 27, s. 3, shows the policy of the Legislature, for it  
 enacts, "That, from and after the first day of September next, all  
 "personal actions brought in the Borough Courts of England and  
 "Wales shall be commenced by *writ of summons*."

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*S. B. Millar*, with whom was *Napier*, in support of the pleas.

Attachment was the old Common Law process to enforce appearance; and unless these Manor Court statutes have taken it away, the process still exists: *Ashley on Attachment*, p. 7; "The process of attachment seems therefore in its origin to have been intended merely to compel the appearance of the defendant by sufficient sureties, to answer the plaintiff's demand." Then if a statute be made in the affirmative, without any negative expressed or implied, it does not take away the Common Law right: *Vin. Abrid. Stat.*, E. 6. There is a distinction taken by the statutes, and either summons or attachment may be pursued by the suitor. The recital of the 25 G. 3, c. 44, shows that the summary mode is the one contemplated, for it speaks of the proceedings in Manor Courts being attended with great delay and expense. The 3rd section, which has been referred to, is material for our view; and the 5th section, which provides an appeal to the going Judge of Assize, if the party feel themselves aggrieved by any decree of the Seneschal, enacts that, "Every such Seneschal or Steward is hereby required to stop further proceedings on every such decree, upon the party appealing therefrom entering into a bond to the party obtaining such decree, with sufficient security, in double the sum awarded by such decree," &c. But the 7 G. 4, c. 41, recognises the process of attachment; for though it repeals the exceptions in the former Act, confined to one formal matter, it does not interfere with this process that had existed up to 25 G. 3. The justification here is by the Seneschal; the attachment duly issued, and the goods are seized by the marshal in due course of law. The 4th section of that statute is precise, "That the goods and chattels of any defendant which

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"shall or may be seized or taken under any attachment issuing out of any Manor Court in Ireland, shall not be sold or exposed to sale, but shall remain in custody of the marshal or other officer until the Court-day next preceding the Court-day at which any defendant to whom such goods or chattels shall belong shall have been summoned to appear as aforesaid," &c. Attachment against the goods is primary process, and must be executed before the party appears. The effect of the proceeding is merely to enable the person whose goods are taken to have notice of the sale of the goods; but it by no means makes the Seneschal a trespasser: *Higginson v. Martin and Hadley (a)*.

*Tomb* replied.

If a summons were at all necessary, the second plea is bad; and the practice of these Courts is against issuing attachments to enforce appearance, for in the Manor Courts in the county of Dublin the Seneschals never act on that process. It is a mistake to suppose that it is left optional with the suitor to proceed by summons or by attachment; for the preamble of the statute 25 G. 3, c. 44, reciting the great delay and expense incurred in proceeding in Manor Courts, shows that its object was to facilitate the proceedings in these Courts, and to render them less expensive; to assimilate them as much as possible with the Assistant-Barristers' Courts, and therefore that statute provides for the issuing a summons. Then the 7 G. 4, c. 41, which contains the words, "on complaint or application of the suitor," means nothing more than that a suit must be instituted before the jurisdiction attaches. The 4th section no doubt refers to the process of attachment, but that statute does not interfere with that old process, if the jurisdiction of the Court include sums above £10, but in other cases that process was abolished by these statutes. The 25 G. 3 provides a new remedy, which was intended to prevent the delay and expense of the old proceedings; a summons must therefore be the foundation of the proceedings in these Courts of limited jurisdiction, and therefore these pleas are untenable.

(a) *Freem. Rep.* 321.

BLACKBURNE, C. J.

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This is a plain case; depending upon the construction of the Acts of Parliament that have been referred to in the argument. Whatever the practice of these Manor Courts may have been, it is impossible to read the provisions of these Acts and to entertain any doubt on the subject. The plaintiff brings this action of trespass against the Seneschal of a Manor Court, for issuing an attachment in a case where the debt amounted to a sum of £1. 10s., and the question is, whether that proceeding be in accordance with the statutes? The first of these statutes is 25 G. 3, c. 44, which is entitled "An Act for the more speedy and easy recovery of small debts in the Manor Courts within the kingdom, and for regulating the costs of proceedings for that purpose." It recites that the present mode of proceeding (that is, by attachment) to recover debts in the Manor Courts of this kingdom is attended with great delay and expense. It is then for preventing that delay and expense, and affording a remedy in this respect, that the statute was passed. It provides that it shall and may be lawful to and for the several Seneschals and Stewards of manors within this kingdom, &c., in all cases of debt, assumpsit and *insimul computasunt*, not exceeding the sum of £10, and in all cases of *quantum meruit*, trover, trespass or detainue, not exceeding the sum of £5, &c., upon application for that purpose, to issue or cause to be issued a summons or process in the name of such Seneschal or Steward, returnable to the next Court to be held by such Seneschal or Steward within such manor. On this summons or process there is a jurisdiction created to try the case by a jury; and provisions follow for enforcing the attendance of witnesses, compelling them to give evidence, and for an appeal to the going Judge of Assize.

Looking to these provisions, no person can doubt that a totally new course of proceeding was prescribed, in order to remedy existing abuses; and that the words of the Act, in order to effectuate that object, were to be construed as mandatory.

The 9th section, after stating the fees to be paid, provides that nothing therein contained shall extend, or be construed to extend, to abridge the jurisdiction of any Manor Court having jurisdiction

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 COSTELLOE sums therein mentioned, according to the ordinary rules of law.

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Nothing can be clearer than the meaning which this proviso conveys ; it is little, if at all, short of an express declaration that in cases of the limited amount specified, the jurisdiction by attachment is to cease, and to be succeeded by process by civil bill : but that in cases exceeding that amount, the process by attachment is continued as theretofore.

It is not necessary to refer to any of the provisions of the subsequent Acts ; so far from contravening the object or policy of that statute of the 25 *G.* 3, they are in affirmance of its principle and in effectuation of, the very same objects to a wider and more unlimited extent.

CRAMPTON, J.

The pleas are essentially bad. The decision of the Court is a wholesome one, and I only regret the Legislature has not deprived these Courts of all jurisdiction.

PERRIN, J., and MOORE, J., concurred.

Judgment for plaintiff on both demurrers.

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KELLY

v.

THE MIDLAND GREAT WESTERN RAILWAY  
COMPANY.

May 22.

BOYCE, on behalf of the defendants, moved that the writ of *capias ad respondendum* and all subsequent proceedings founded thereon be set aside, on the ground that the writ was null and void; the defendants are a Corporation, and as such not suable by *capias*: *Langley v. Bailiffs and Burgesses of East Redford (a)*. There the defendants were sued in their corporate capacity by common *capias*, and upon affidavit of service an appearance was entered by plaintiff *secundam statutum*, and then entered a declaration in the office, reciting that the defendants were attached to answer; defendants moved to set aside the *capias* and the proceedings thereon, objecting they should be sued by *pone* and *distringas*: and the Court were of opinion that as the defendants were sued in their corporate capacity, the *capias ad respondendum* is null and void, and the rule to show cause was made absolute. Here we have an affidavit that this Company are incorporated by Act of Parliament.

A Corporation cannot be sued by *capias ad respondendum*, and proceedings against them grounded on such process are null and void.

*John Perrin*, contra.

*Per Curiam.*

Allow the motion with costs.

(a) Barnes's Notes of Cas. 415.

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## BATCOCK v. COLE.\*

Jan. 18, 21.

To a declaration by the plaintiff as indorsee of two bills of exchange, the defendant pleaded that he did lose a certain sum of money to A B, and the said A B did win of the defendant a certain sum of money, to wit, the sum of £500, by gaming and playing at a certain game called hazard, and that he accepted those two bills as security for the money so lost; and that the plaintiff when he became indorsee and holder and interested in those bills, knew that the same had been made on this illegal consideration. Replication protesting that the said bills were given for this illegal consideration, nevertheless that the bills before they became due were indorsed to the plaintiff for valuable consideration, and that when he first became and was the indorsee and interested in said bills, he did not know that same had been made for the illegal consideration alleged. *Held*, on special demurrer, that the replication was sufficient.—CRAMPTON, J., *dissentiente*.

ASSUMPSIT by indorsee against acceptor.† The declaration contained two counts on two separate bills of exchange, each purporting to be drawn by one George Maugham for the sum of £250, on the 21st day of June 1845, and accepted by the defendant and indorsed over to the plaintiff; and the money counts.

To this declaration the defendant pleaded non-assumpsit to the whole declaration, and further to the first and second counts *actionem non*; because he saith, "That before the accepting of "the said bills of exchange in the said first and second counts "mentioned, or either of them, by the defendant as therein mentioned, to wit, on the 21st day of June A. D. 1845, at Dublin, "in the county of the city of Dublin aforesaid, the defendant did "lose to one George Maugham, and the said George Maugham "did win of the defendant, a certain sum of money, to wit, the "sum of £500, by gaming and playing at a certain game called "hazard; and the said sum of £500 so lost by the said defendant "as aforesaid, and so won by the said George Maugham as aforesaid, being and remaining unpaid and unsatisfied, heretofore, to "wit, on the 21st day of June, A. D. 1845, to wit, at, &c., aforesaid, it was agreed between the said George Maugham and the "defendant that the payment thereof should be secured by two "bills of exchange to be accepted by the defendant; and the "defendant avers that in pursuance of the said agreement, to wit, "on the day and year last aforesaid, to wit, at, &c., the defendant,

\* This case is printed out of its order, a writ of error having been sued out.

† *Coram* CRAMPTON, J., and PERRIN, J.

“for securing the said payment of the said sum of £500 so won  
 “and lost as aforesaid, accepted the said two bills of exchange  
 “in the said first and second counts respectively mentioned, con-  
 “trary to the statute in such case made and provided; and the  
 “defendant avers that the said two bills of exchange so accepted  
 “as aforesaid were and are the identical bills of exchange in the  
 “said first and second counts respectively mentioned. And the  
 “defendant further saith, that the plaintiff, before and at the time  
 “when he first became and was the indorsee and holder, and  
 “interested in the said two bills of exchange, or either of them,  
 “to wit, on the 21st day of June, A. D. 1845, to wit, at, &c.,  
 “aforesaid, well knew that the same had been, and were, and  
 “that each of them had been, and was, so made upon and for  
 “the said illegal consideration.” *Verification.*

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*Replication* to this plea, *precludi non*; because protesting that such illegal agreement was not made as in said plea to the first and second counts mentioned, and that the said several bills of exchange in the said first and second counts respectively mentioned were not, nor was either of them, given for such illegal consideration, as in the said plea to the said first and second counts mentioned; for replication nevertheless the said plaintiff saith, “that the said  
 “several bills of exchange in the said first and second counts  
 “respectively mentioned, were indorsed to the said plaintiff after  
 “the 31st day of August, A. D. 1835, and before the said bills  
 “respectively became due, to wit, on the day and year in the said  
 “declaration in that behalf mentioned, to wit, at, &c., aforesaid, for  
 “valuable consideration: that is to say, for and in consideration of  
 “the said plaintiff discounting the same and paying therefor to the  
 “said George Maugham, being then and there the holder thereof  
 “respectively, a large sum of money, to wit, the amount of the  
 “several sums of money in the said several bills of exchange respec-  
 “tively mentioned, less by the interest thereon for the time which  
 “the said several bills respectively then had to run; and that he the  
 “said plaintiff did not before, or at the time *when he first became*  
 “*and was the indorsee and* interested in the said two bills of  
 “exchange, or in either of them, to wit, on the 21st day of June,

H. T. 1848. "A. D. 1845, to wit, at, &c., know that the same had been or were,  
*Queen's Bench.* "or that either of them had been, or was, made upon or for the  
 BATCOCK "illegal consideration in the said second plea of the said defendant  
 v. "alleged; and this he the said plaintiff prays may be inquired  
 COLE. "of by the country," &c.

Special demurrer, that the replication stated that the plaintiff did not, before or at the time when he first became and was the indorsee and interested in the said two bills of exchange, or in either of them, know that the same had been or was made upon or for the illegal consideration in the second plea alleged, whereas the replication ought to have stated that the plaintiff did not before, or at the time when he first became and was the indorsee, or interested in the said two bills of exchange, or in either of them, know that the same had been or were, or that either of them had been or was made upon or for the illegal consideration in the second plea alleged; and also, that the traverse in the replication contained was too large; and also, that the replication was in the conjunctive, whereas the traverse ought to have been in the disjunctive; and also, that the replication, although it introduced new and material matter in the affirmative, concluded to the country, instead of concluding with a verification, &c.

Joinder in demurrer.

*Charles Kelly*, for the demurrer.

The traverse in the replication is too large; it assumes that "interested in" means the same as when the plaintiff became the indorsee; the replication should have traversed when the plaintiff became the indorsee *or* holder, *or* interested in, that is, when he paid these several bills of exchange. In place of the conjunctive "and," the disjunctive "or" should have been used. But secondly, the traverse is too large, because the plaintiff has not denied that the consideration, *or any part of* it, was illegal; for if a farthing of the money was illegally lost he could not recover. Then, thirdly, it is too large, because in the plea it is alleged the money was lost at a game called hazard, and by the replication we would be bound to

prove it was at that particular game the money was lost.—[CRAMP-  
TON, J. What issue would be tried under the replication?—The  
illegal consideration, and whether or not the money was lost at the  
game specified. The proper form of replication is given in 3 *Chit.  
on Plead.* p. 1146, showing that the traverse should be in the dis-  
junctive. In *Steph. on Plead.* p. 272 (5th ed.), it is said, “A traverse  
“may be too large, by involving in the issue quantity, time and  
“place, or other circumstances which, though forming part of the  
“allegation traversed, are immaterial to the merits of the cause :  
“*Goreham v. Sweeting* (a).” Where, to an action on an attorney’s  
bill, the plea was, that it was brought for fees at law and in  
equity, and no bill delivered, and the replication traversed that it  
was brought for fees at law *and* in equity, this was held ill, for  
the defence would have been good, if the action were brought for  
either : *Moore v. Boulcott* (b). Then there is new matter intro-  
duced in the replication, and it should, therefore, have concluded  
with a verification : *Steph. on Plead.*, pp. 260, 261.—[CRAMP-  
TON, J. I doubt if the same matter be not in the plea.]

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*Maley and Gilmore*, contra.

The issue tendered by the plea is, that the plaintiff had notice of  
the infirmity of the transaction, and that therefore his title as holder  
of the bill is vitiated ; all the allegations tend to that one point. So,  
that if the demurrer taken to the replication be good, the plea is bad :  
*Humphreys v. O'Connell* (c). The plea does not allege that there  
was a want of consideration ; and by the plea the defendant makes  
the holding, the indorsement and the being interested in, one aver-  
ment. The defendant cannot deny the consideration, because he has  
not traversed the want of consideration, nor that the plaintiff was a  
purchaser for value : *Cowlishaw v. Cheslyn* (d) ; *Eden v. Turtle* (e).  
The sole fact the defendant would have to prove under his plea

(a) 2 Saund. 207, note a.

(b) 1 Bing. N. C. 323 ; S. C. 1 Scott, 122.

(c) 7 Mee. & Wels. 370 ; S. C. 9 Dow. P. C. 213.

(d) 1 Cr. & Jer. 48.

(e) 10 Mees. & Wels. 635

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would be, that the plaintiff, at the time he became the holder of the bill, had notice of the illegality of the transaction.—[CRAMPTON, J. If the trial proceeded on the plea, and the defendant proved that you had notice, he must succeed on that plea : but the question is, having joined the three averments by the conjunctive, would there not be more proof required than the mere fact of the holding?]  
But that is the defendant's own doing ; we say they mean one and the same thing, and that meaning is, that the plaintiff had notice of the infirmity of the bills : *Alsager v. Currie* (a). It is argued the traverse is too large ; but the demurrer does not state wherein it is too large. The replication denies notice of the illegal consideration, and thus puts in issue the whole substance of the plea, and therefore the conclusion to the country is proper : *Hedges v. Sandon* (b). It is urged that "and" should be "or ;" but when is a party indorsee of a bill ? Surely not before he becomes interested in it : *Marston v. Allen* (c). The being interested in it, is cotemporaneous with the indorsement ; and until the bill be transferred, the party is not interested in it. The word "and" is quite correct ; for the two events are cotemporaneous, and the one is necessarily the result of the other.—[CRAMPTON, J. A bill may be indorsed to A B in trust for C D, to whom it may be afterwards indorsed ; may not the party then be interested in the bill before it is indorsed to him ?]  
That is a trust. Here the validity of the consideration is admitted, and the sole question at the trial would be, had the plaintiff, or had he not, notice of the infirmity in the bill ? That is a defence, if true, and a direct negative and affirmative being tendered by the pleadings, the conclusion to the country is right. Even if new matter be introduced, it is but surplusage—a species of inducement to the traverse ; and the rule as to new matter requiring a verification applies only when that new matter is something in support of a former pleading of the same parties.

*Kelly* replied.

*Cur. ad. vult.*

(a) 11 Mees. & Wels. 14.

(b) 2 T. R. 432.

(c) 8 Mees. & Wels. 494.

PERRIN, J.

This was an action of assumpsit, brought by the indorsee of two bills of exchange, against the acceptor; and the declaration was framed in the short form prescribed by the Rules of 1832; and by that form is implied both an indorsement and a delivery.

The defendant pleads that before accepting the bills he lost a sum of money, laying it under a videlicet, at a game of chance; and that before the plaintiff became the indorsee, the bill had been passed for that illegal consideration. The plaintiff in his replication alleges he did not know that the bills had been drawn for the illegal consideration stated in the plea; and the demurrer taken is to the effect that the replication is too large in one sense, too narrow in another; for first, it is insisted that the plaintiff should have averred he did not know that the bill had been drawn for the illegal consideration in the plea mentioned; whilst the ground of the demurrer is, that he should have denied he knew it when he became indorsee or holder, or interested in the bill. The plaintiff shows title as indorsee; and the defendant pleads that at the time when the plaintiff became the indorsee and holder and interested in the bill, he knew that it was made for the illegal consideration specified; that throws no additional proof on the plaintiff; this is a bill payable to the order of the drawer, to which no one could obtain title except by indorsement; for delivery would not give title, and therefore the words in the plea, "holder and interested in," are merely tautologous. The demurrer assumes these are distinct matters, occurring at different times, whereas they are nothing but the legal effect of the indorsement. If we adopted the suggestion that they are three distinct occurrences at three several times, the full benefit of them is given to the defendant; for the plea says, before and at the time when the plaintiff first became the holder and indorsee and interested in; and the replication says, he did not, before or at the time when he first became and was the indorsee and interested in the said bills, know that they were made for the illegal consideration averred in the plea. It is still one period; the indorsement, the holding and the being interested in, are all one matter, and not three matters.

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Then, it is secondly argued that the defendant would be bound to prove that the whole sum of £500 was lost at hazard; whereas, if the replication had been properly framed, he would not have been so bound. That is a mistake; the *videlicet* shows he could not be so bound; for all that the plea avers is, that he lost a sum, to wit, the sum of £500, and that the bills were given as security for that sum; the defendant, to sustain that averment, would only have to prove that a sum of money was lost, and that the bills were given for it. I am not quite satisfied whether, on the words of the plea, the defendant might not be obliged to prove the game at which the money was lost was hazard; but if it be necessary, the defendant has himself to blame; for the replication follows the plea, and nothing is to be proved but what is alleged in the plea. The argument on this head would make the pleading a game of chance.

It was further objected that the replication should have concluded with a verification; but it introduces no new matter, and simply puts the defendant on more exact proof of his allegation.

*Goreham v. Sweeting* was cited, to establish that by the traverse taken the matter of proof was narrowed; but that case was argued on a plea, not on a replication.

The cases cited in *Goreham v. Sweeting*, from *Yelverton & Dyer*, would have met one allegation as to the precise game at which the money was lost; but on that point I offer no opinion. If the cases in *Yelverton & Dyer* do not apply, the defendant is not tied down to the game he has averred in his plea. I think therefore the demurrer should be overruled.

CRAMPTON, J.

My impression is, that the demurrer in this case should be allowed; *not* on the ground that the replication should have concluded with a verification; for although new matter may have been introduced, yet it is not such as the defendant could have taken issue upon. But the ground upon which I think the replication faulty is, that it offers an issue which would narrow the defendant's defence under his plea. Had the replication been *de injuriâ suâ*, as it might have been, the defendant would have had

to prove only the substance of his plea—namely, that the bill declared on was a security in the whole or in part for a gambling debt, and that the plaintiff, before he became interested as holder or indorsee of the bill, had notice of its infirmity. But by the special replication pleaded, the plaintiff throws it on the defendant to show that the game at which the money for which the bill was passed was specially the game of hazard, and that the whole consideration, and not merely a part of it, was money lost at that game; whereas under his plea, had issue been joined thereon by a replication *de injuriâ*, the defendant would have sustained the issue on his part, by showing that any part of the sum secured by the bill was for money lost at play, and that the play was either hazard or any other unlawful game.

Again, the plaintiff's replication casts upon the defendant the onus of giving notice to the plaintiff of the infirmity of the bill, at the time of his *first* becoming interested in the bill, as well as the time of his becoming the indorsee of it. Now, it is admitted that the plea would, in this respect, have been sustained, had issue been joined upon it, by showing notice to the plaintiff before or at the time of his first becoming either interested as holder or indorsee of the bill. This seems to me clearly to narrow the defence. But the answer given to it by the plaintiff's Counsel is, that becoming holder, being interested in and being indorsee, are all one and the same thing, or at least are all cotemporaneous.

But may not a bill of exchange be handed over by the drawer without indorsement to A B, as a pledge for a smaller sum than that secured by the bill? and does not A B thereby become interested in the bill, though he is not the indorsee of it? Let me suppose that the bill is afterwards regularly indorsed to A B; he then holds the bill as indorsee. Now, might it not happen that A B had *no* notice of the vice of the bill at the time he became interested in it as a pledge, but that he had such notice before the bill was transferred to him by indorsement? Other cases of a similar kind might be put; and if this be so, the replication, by putting it on the defendant to show notice before or at the time that the plaintiff became first interested in the bill *and* indorsee thereof, has narrowed

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H. T. 1848. the defence. He has substituted "and" for "or" in the sentence  
*Queen's Bench.* of his replication in which he denies notice; and in so doing he has  
BATCOCK departed from the precedents on this subject; and I own I am  
v. strongly disposed to look with suspicion upon a pleading which  
COLE. seems studiously and unnecessarily to depart from precedent.

My own opinion would therefore be in favour of the demurrer; but the Court being divided, the demurrer must be overruled: and I am not sorry for the result, since the defendant on the general issue may have the full benefit of the defence relied upon in his special plea.

Demurrer overruled.

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BOOTH v. BOOTH.

(*Common Pleas.*)

Nov. 7, 24.

A deed of submission to arbitration had been entered into between Joseph, John, Thomas and George Booth respectively. That deed of submission had been submitted to and settled by Counsel on behalf of Joseph Booth. Upon the arbitration before an eminent Queen's Counsel, two gentlemen of the Outer Bar appeared on behalf of Joseph Booth, and one gentleman of the Inner Bar appeared for the other parties. The arbitrator awarded certain costs to Joseph Booth.

On the taxation of those costs the Taxing-officer disallowed the items for "draft instructions and copy for Counsel to settle deed of submission," "attending Counsel therewith," and "Counsel's fee." He also disallowed the fee, brief and other expenses attendant upon the employment of the second Counsel on behalf of Joseph Booth upon the arbitration.

At the request of the attorney for Joseph Booth, the arbitrator certified that in the discussion of the several matters which were referred to and came before him, difficult and doubtful questions of law and equity arose as to the respective rights of the parties, in the argument of which the services of Counsel were in his (the arbitrator's) opinion absolutely necessary, and that he had to take a troublesome account between the parties extending over a period of twelve years.

*Coates* and *R. Armstrong* now moved that the items so disallowed should be allowed, or that the Taxing-Master should be ordered to review his taxation with reference to those items.

*Fitzgibbon*, on the other side.

Upon the taxation of costs as between party and party, there is not any principle against the allowance of fees to Counsel for settling deeds of submission to arbitration in cases of importance.

The Taxing-officer, having in such a case disallowed the expenses incidental to the employment of Counsel, was directed to review his taxation.

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Let the motion stand, in order that the Taxing-officer may report specially to the Court the circumstances under which he disallowed those items.

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Nov. 24.

The Taxing-Master in his report stated that he disallowed the items with reference to the deed of submission, "because it is contrary to the practice in the taxation of law costs between party and party to allow any fee to Counsel for the settling of a deed; the reason of which I apprehend to be, that a deed is not a document which requires the signature of Counsel to give it effect. For instance, no fee is ever allowed to Counsel in the taxation of costs between party and party for drawing a fine, or a recovery, or a deed to declare the uses thereof, because the signature of Counsel is not required to these documents. So in England, where the signature of Counsel is not required to declarations or to the plea of the general issue, no fee is allowed to him for drawing the pleadings; but if the pleadings be special, as a replication or demurrer, &c., the signature of Counsel is necessary before the pleading is filed, and then a fee is always allowed to Counsel. In Ireland, where by a rule of all the Law Courts every pleading must be signed by Counsel before it can be filed, a fee is always allowed to him for drawing declarations, the plea of the general issue and every other pleading." The Taxing-officer further reported that he disallowed the items for the brief and fee to a second Counsel, because previously to the arbitration it had been arranged, between the attorneys concerned, that one Counsel only should be employed on each side.

The Court refused to go into consideration of the latter items, in consequence of the finding of the officer that there was a special agreement as to the employment of one Counsel only, inasmuch as they regarded the report as conclusive upon this fact, although an attempt was now made to impeach it at the Bar.

*Coates* read to the Court the Taxing-officer's report, and adverted

to the deed of submission as embracing several matters of a complicated nature. The original draft of this deed was produced in Court; several alterations and interlineations in it bore strong testimony to the industry of the revising Counsel.

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DOHERTY, C. J.

I do not exactly appreciate the analogy drawn by the report between the signature of pleadings and the settling of a deed of submission.

*Fitzgibbon.*

No principle being involved in the present question, the Court will not interfere with the decision of its officer. This deed might easily have been prepared by the attorney. A simple submission of all matters in dispute between the parties would have gained the end contemplated by this deed, which is unnecessarily long. Upon our side the deed was not perused by Counsel.

DOHERTY, C. J.

The deed seems to have been laboriously settled, and to have submitted to the consideration of the arbitrator numerous family rights. Finding it to have been so well settled, the clients of Mr. *Fitzgibbon* did not require its perusal by Counsel on their side, but, acquiescing in it, went before the arbitrator. We are in the habit of hearing blame thrown upon attorneys who take upon themselves too much responsibility in these matters. The attorney here seems to have exercised a proper discretion in obtaining the assistance of Counsel. We do not think that there is any principle against the allowance of fees to Counsel for the settling of such deeds, in cases of sufficient importance to warrant their employment. Looking at the facts here, and especially at the draft of the deed, this appears to us to be such a case. Let the officer review his taxation with respect to these items: we confirm his decision as to the employment of a second Counsel before the arbitrator, and we do not give costs of this motion to either party.

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PRENDERGAST v. THE EARL OF ———.

Nov. 25.

To a *fi. fa.* in this action, issued in October 1848, the Sheriff returned that previously to its delivery to him four similar writs against the same defendant had been delivered to the late Sheriff, of which the first writ was so delivered upon the 15th of February 1847, and was returnable upon the 15th of April 1847; the second was so delivered upon the 12th of November 1847, and returnable on the 19th of the same month; the third was so delivered upon the 31st of December 1847, and returnable on the 11th of January 1848; and the fourth was so delivered upon the 6th of January 1848, and returnable on the 11th of the same month. He then specified in the same manner the delivery to himself (the present Sheriff) of six other writs of *fi. fa.* against the same defendant, and before the delivery of the writ in the present action; and then certified that by virtue of the four first writs, and according to their respective priorities, the late Sheriff seized certain goods belonging to the defendant, and of a certain value, and that those goods remained on hands for want of buyers, and that the defendant had not any other goods within the bailiwick at the time of the delivery of the writ in this action to the present Sheriff, or at any time since, whereout he could levy the sum therein mentioned, or any part thereof. *Held* a bad return, and that the Sheriff must amend it and pay the costs of the motion for compelling him so to do.

To the writ of *fi. fa.* issued in this cause upon the 9th of October 1848, and returnable upon the first day of this Term, the Sheriff, in his return, certified that on the 15th of February 1847, and before the delivery to him of the *fi. fa.* in the present cause, another writ of *fi. fa.* against the goods and chattels of the same defendant, issuing out of the Queen's Bench, and returnable on the 15th of April then next ensuing, was delivered to A B the late High Sheriff, the predecessor in office of him (the present Sheriff.) He then further certified in the same manner the delivery to A B, as such Sheriff, of three other writs of *fi. fa.* against the goods and chattels of the same defendant in three different actions, of which writs he specified one as having been delivered upon the 12th of November 1847, and as having been returnable upon the 19th of the same month; another, as delivered upon the 31st of December 1847, and returnable upon the 11th of January 1848, and another as delivered upon the 6th of January 1848, and returnable upon the 11th of January 1848. The return in the same manner further specified the delivery of six other writs of *fi. fa.* to the present Sheriff, at the suit of various plaintiffs, against the goods and chattels of the same defendant, all of which writs the Sheriff enumerated according to the dates of their delivery to him, and averred them to have been delivered to him before the writ in the present cause. The return then proceeded thus:—"And I further certify that by virtue of the four first mentioned writs, and accord-

"ing to the priorities thereof respectively, the said late High Sheriff  
 "took and seized the following goods and chattels of the said Earl:  
 "to wit, two hundred sheep, twenty cows, fourteen horses, three  
 "carriages and harness, and a quantity of household furniture of  
 "the amount and value of £800; and that those goods and chattels  
 "remained on the hands of the said late High Sheriff for want of  
 "buyers; and that the said Earl had not any other goods or chattels  
 "within my bailiwick at the time of the delivery to me of the said  
 "annexed writ, or at any time since, whereout I could levy the sum  
 "therein mentioned, or any part thereof. So answers," &c.

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*J. B. Murphy*, for the plaintiff, now moved that the Sheriff should be directed to amend his return. The present return is an evasion of the process of the Court. It is an argumentative return of *nulla bona*, but yet not such a one as would entitle us to bring an action for a false return. If the Sheriff had returned *fieri feci*, then we might have issued a *venditioni exponas*. As the return at present stands, we have no remedy against the collusion which exists between the prior execution creditors, the Sheriff and the defendant. That collusion is manifest from the dates disclosed by the return; the first writ named by it is stated to have been delivered to the late High Sheriff so far back as the 15th of February 1847, and to have been returnable on the 15th of April following, now more than one year and a-half past.

In *Lovick v. Crowder* (a), in the month of March, the then Sheriffs of London seized the goods of a debtor by virtue of a *fieri facias*. An officer was put in possession of the goods, but the execution creditor directed the Sheriffs not to sell, and the debtor continued to have the control of the goods until November, when another execution creditor sued out a *fieri facias* directed to the succeeding Sheriffs of London. The Court of Queen's Bench held that the latter Sheriffs were bound to levy under the second *fieri facias*, and that it was their duty, when they found the officer of the former Sheriffs in possession, to inquire into the facts, and, if they

(a) 9 B. & C. 132; *et vide ibid.* *Crowder v. Long*, 598.

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had done so, they would have learned that the first execution was fraudulent. Lord Tenterden there says that "the possession of the former Sheriff is no more than the possession of any third person" "would be under a bill of sale. Now, if a party be in possession of "goods apparently the property of a debtor, the Sheriff, who has a "*fiari facias* to execute, is bound to inquire whether the party in "possession is so *bonâ fide*, and if he find the possession is held "under a fraudulent bill of sale he is bound to treat it as null "and void, and levy under the writ." Though a writ of *fiari facias* bind the goods as against the defendant, yet the property is not divested out of him until execution is executed, and therefore an execution and sale under a subsequent writ delivered to the Sheriff will bind the goods; but the plaintiff in the first execution has his remedy against the Sheriff if the non-execution of the writ did not proceed from his own laches: *Payne v. Drew* (a). The Sheriff may return a seizure under several writs of *fiari facias*, according to their priority: *Chambers v. Coleman* (b); if he had done so here, including our own writ, we should have been placed in a condition to issue a writ of *venditioni exponas*.

*D. Lynch and J. Pennefather*, for the Sheriff.

*Lovick v. Crowder* was an action for a false return of *nulla bona*, and therefore of quite a different nature from the present case. We are quite willing that the plaintiffs should bring their action here if they complain of a false return. At all events, upon the present motion the return must be taken to be true.—[DOHERTY, C. J. That is the very ground upon which the plaintiff calls upon the Court now to interfere; he complains that the Sheriff, by his own return, shows remissness in the discharge of his duty, and an unjustifiable evasion of the process of the Court.]—A second writ does not attach the goods until they are discharged from the first. The plaintiff in the earlier action, if treating with the defendant for an arrangement of his claim, may be taken by surprise if the execution of the writ in the second action be forced on. The delay

(a) 4 East, 523.

(b) 9 Dow. P. C. 588.

here complained of might have been accounted for if the Sheriff had, according to the usual course, been called upon to answer such affidavits as the plaintiff may have filed.—[DOHERTY, C. J. We cannot presume such a state of facts as would justify the Sheriff in making an illegal return.]—The proper course for the plaintiff would be to issue a distringas to the former Sheriff.

M. T. 1848.  
Common Pleas.  
PRENDER-  
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EARL OF

Counsel also mentioned *Wintle v. Chetwynd* (a), and therein the dictum of Patteson, J., that a Sheriff cannot return that he has seized under two writs, because one of them must have a priority.

*J. B. Murphy.*

That dictum is by Coleridge, J., with the authority of Patteson, J., stated to have been laid down too broadly by the Reporter of *Wintle v. Chetwynd*; *Chambers v. Coleman* (b). Taking it, however, to be good law, it would show the return here to be vicious; forasmuch as it avers a seizure by the former Sheriff under the four first-named writs.

DOHERTY, C. J.

The case before Lord Tenterden is too strong for the Sheriff to contend against; he must amend his return. Although that case was an action for a false return, and this is a case in which it is sought to compel the Sheriff to amend a return not alleged to be untrue, yet from the former can be extracted what should be the rule for the Sheriff's conduct, when he gets a writ under circumstances such as both there and here presented themselves. We think that the plaintiff is entitled to the costs of this motion.

TORRENS, J.

If we were to accept this as a proper return, we should allow too great a latitude of discretion to the former Sheriff.

BALL, J.

The circumstance relied on by the Court in *Lovick v. Crowder*

(a) 7 B. & C. 554.

(b) 9 Dowl. P. C. 588.  
41 L.

M. T. 1848.  
*Common Pleas.*

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exists here—namely, lapse of time. Mr. Justice Bayley there is represented to have said:—"Where a plaintiff sues out execution, "and seizes under a *feri facias* the goods of his debtor, and suffers "them to remain long in his debtor's hands, a subsequent execution "creditor may treat the goods as the goods of the debtor." And again:—"But it is said that they (the Sheriffs) ought to have "forborne seizing them when they found the officers of the late "Sheriffs in possession. I think, however, that it was the duty of "the defendants to ask to see the warrant; and if they had done so, "they would have found, from the date of the warrant, that there "had been gross delay; and then they would have been bound to "treat the first execution as fraudulent and void, and to have "seized the goods." The delay in the present case has been yet greater than that which was thus deprecated by Mr. Justice Bayley, in whose observations I completely concur.

JACKSON, J., concurred.

Motion granted with costs.

### WATTERS v. LIDWILL.

Nov. 25.

Plaintiff below, becoming plaintiff above, is not required to give bail in error.

The conflicting decisions in *Dowson v. M'Entyre* (3 Ir. Law Rep. 443), and *Stephenson v. Higginson* (Bl. Dan. & Osb. 37), considered.

In this case (reported in 9 *Ir. Law Rep.* p. 362), a writ of error having been sued out by the plaintiff upon the 28th of October, upon the 17th of November the defendant obtained a rule that the writ of error should be quashed, unless the plaintiff gave bail within four days.

*Sterne Miller* now moved that the rule of the 17th of November should be vacated and set aside for irregularity, inasmuch as a plaintiff in error, who is plaintiff below, is not required to give bail

in error. So it has been held on the English statute 3 Jac. 1, c. 8: *Freeman v. Garden* (a); *Duvergier v. Fellowes* (b). M. T. 1848.  
Common Pleas.

Of the same opinion was the Court of Exchequer in Ireland in *Quin v. National Insurance Company* (c), and *Stephenson v. Higginson* (d); in which latter case the question is said to have been similarly decided in this Court in *O'Connell v. Mansfield*, a case not elsewhere reported upon this point. WATERS  
v.  
LIDWILL.

The General Rule of all the Courts in Easter Term 1834, in requiring the recognizance of bail in error to be taken in "double the sum recovered," shows that the Judges, who framed those Rules, contemplated the application of the Irish statute 1 G. 4, c. 68, s. 7, to the single case of a defendant below becoming plaintiff above. The words in both statutes stating, that the bail is to be taken in order to satisfy "the debt, damages and costs" if the judgment appealed from be affirmed, have a similar bearing, forasmuch as neither debt nor damages are recovered by a defendant who is successful below.

The English cases cited go farther than we seek to do, for there the Court discharged the bail which had in fact been given by the plaintiffs.

*Molesworth.*

The Irish statute 1 G. 4, c. 68, is explicit that the plaintiff in error must give bail "in any case whatsoever;" and in *Dawson v. M'Entyre* (e), the Court of Queen's Bench held that the plaintiff below must give bail; Burton, J., saying, "Nothing can be more precise than the language of the 1 G. 4, c. 68; it says 'in any case whatsoever;' it is impossible not to see that these words 'include a case like the present.' And again, he says:—"The clear intention of the framers of the statute was, that the party "who sues out a writ of error should secure the other party any

(a) 1 Dowl. & Ry. 184.

(b) 1 Dowl. P. C. 224; *et vide* 5 Moo. & P. 403; 7 Bing. 463.

(c) Bl. Dun. & Osb. 38.

(d) Bl. Dun. & Osb. 37.

(e) 3 Ir. Law Rep. 443.

M. T. 1848. "sum of money adjudged to him by the Court below ; *and costs are*  
*Common Pleas.* "expressly mentioned in the statute."

WATTERS  
 v.

LIDWILL.

In the same case Crampton, J., adopts the statement in 1 *Ferg. Practice*, that it appears to have been the uniform acceptation of the meaning of the statute, that the plaintiff below, as well as the defendant, should give security for costs. Upon application to the Counsel and attorneys engaged in *O'Connell v. Mansfield*, we have found that this point was never raised ; and that in fact the plaintiff below there did give security ; that case is twice (a) reported upon other points, and no mention made of a question as to security for costs having arisen. *O'Shaughnessy v. Haydn* (b) was also mentioned.

*W. D. Ferguson (amicus Curiae)*, said that there are numerous cases on the files of all the Courts, in which bail has been given by plaintiffs below who became plaintiffs in error.

DOHERTY, C. J.

In point of chronology, *Stephenson v. Higginson*, which was decided by the Court of Exchequer in 1846, has an advantage over *Dawson v. M'Entyre*, decided by the Court of Queen's Bench in 1841. The last named case, together with the other authorities, were brought to the notice of the Court of Exchequer in *Stephenson v. Higginson*, and, notwithstanding that circumstance, the Court adhered to its former unreported decision in *Quin v. National Insurance Company*. The language of the statute, especially the words "debt, damages and costs," lead us to concur in the propriety of the decisions in the Exchequer. There is a very good reason why the Legislature should require bail in error from a defendant below and not from a plaintiff below, because, if the plaintiff appeal there is nothing to be recovered from him in event of the affirmation of the judgment below, except costs ; but if the unsuccessful appellant be the defendant below, the debt and damages, as well as the costs, are recovered, and to secure these to the plaintiff seems to us to be the evident object of the statutes in both countries, and

(a) 9 Ir. Law Rep. 179 ; *ibid*, 440.

(b) Sm. & B. 308.

accordingly to restrain the apparent generality of the words "in any case whatsoever," which occur in the Irish statute. There seems to be some mistake with respect to *O'Connell v. Mansfield*; we have no recollection of this point having been raised in that case. We do not give any costs to either party on this motion.

M. T. 1848.  
*Common Pleas.*  
WATTERS  
v.  
LIDWILL.

Motion granted without costs.

ALEXANDER v. CONNELL.

HARVEY LEWIS, on the part of the Sheriff, moved, under statute 9 & 10 Vic. c. 64, for an order directing the rival claimants to the goods seized in this cause to interplead.—[BALL, J. Have you given them notice of this motion?—We have not. The statute is silent on the subject of giving notice; that such notice is unnecessary may however be fairly inferred from the statute, inasmuch as it is upon application by the Sheriff to the Court or a Judge that the Court or Judge is authorised to call, before them or him, as well the party issuing process, as the party making the adverse claim, clearly showing that the statute did not anticipate the presence of those parties upon the first application.

Nov. 7, 10, 14.

In order to enable the Sheriff to move for an interpleader order under statute 9 & 10 Vic. c. 64, notice of the intended motion must be given as well to the execution creditor as to all the adverse claimants of the goods seized under the *fi. fa.* by the Sheriff.

BALL, J.

In the absence of any direction in the statute, I think the more prudent course for the Court to pursue will be to require service of notice upon all the parties laying claim to the goods seized under the *feri facias*. There are but two cases in this Court as yet

To entitle him to such an order, an application to the Court or a Judge in Chamber must be made by the Sheriff at an early period after he has been made acquainted by

the parties with their respective claims.

Form of order calling upon the rival claimants to appear before the Court, where they have not appeared upon a special motion by the Sheriff for an order of interpleader.

M. T. 1848. reported upon this new statute, *Burke v. D'Arcy (a)*, and *Moylan*  
*Common Pleas.* v. *Rogers (b)*. In the former of these cases notice must have  
 ALEXANDER been given, Counsel having *in limine* opposed Mr. *Lewis*, who now  
 v. CONNELL. moves in the present case. In *Moylan v. Rogers* it does not appear  
 whether notice was given or not. The Court would in the first  
 instance refuse the motion, if the parties were to show that the  
 case was not a proper one for an interpleader.\*

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On this day *Lewis* moved upon notice for an order to interplead.  
 Nov. 10. None of the other parties appeared.

The Court made the following order :—"Ordered that the plain-  
 "tiff and Anne Quinlan of Roundmills in said county, the claimant  
 "mentioned in said affidavit, do appear upon Tuesday the 14th day  
 "of November instant, at the hour of twelve o'clock at noon, before  
 "this Court, to show cause why they should not maintain or relin-  
 "quish their respective claims to the property seized under the  
 "said writ of *feri facias*, and why the Court should not make  
 "such order thereon as to them shall seem meet, pursuant to the  
 "statute 9 & 10 Vic. c. 64; serving this order forthwith upon  
 "plaintiff's attorney and upon the said Anne Quinlan."

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*Hayes*, for the execution creditor.  
 Nov. 14

*James Plunket*, for Mary Quinlan the claimant of the goods  
 seized.

This application is too late. The seizure was made upon the  
 16th of September; the sum for which the writ was indorsed was  
 only £17. Two bailiffs have been in possession of the goods ever

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(a) 9 Ir. Law Rep. 287.

(b) 10 Ir. Law Rep. 266.

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\* As to the necessity of notice to the execution creditor, see *Anonymous*, 1 Bl.  
 Dun. & Osb. 264, and *Braine v. Hunte*, 3 L. J.; N.S. Exch. 85; S. C. 2 Cr. & M.  
 418; 4 Tyr. 243.

since the seizure. The costs now nearly amount to the sum named. M. T. 1848.  
 Notice of her claim was served upon the Sheriff by my client on *Common Pleas.*  
 the day of the seizure. ALEXANDER  
 v.  
 CONNELL.

*Lewis* said that the notice did not reach the Sheriff until the 26th of September.

JACKSON, J.

Why did not the Sheriff make an early application to a Judge in Chamber? Why has he waited until Term?

The Sub-sheriff said that he understood from some of the officers of the Court that there was not any Judge sitting in Chamber.

*Per Curiam.\**

This motion for an order of interpleader has been too long postponed upon the part of the Sheriff; he must accordingly act upon his own responsibility with respect to the goods which he has seized. It is quite an error to suppose that there was not a Judge ready to hear this motion in Chamber. Some misapprehension on the Sheriff's part there seems to have been upon the matter, therefore if the Sheriff forego his fees, we shall not compel him to pay the costs of the other parties who have appeared upon the motion.

\* TORRENS, J., BALL, J., and JACKSON, J.

M. T. 1848.  
*Common Pleas.*

The Executors of JOHN ALEXANDER

v.

SAMUEL HANDY.

SAME v. JOHN HANDY.

Nov. 14.

Where under the Interpleader Act a Sheriff has been permitted to lodge in Court moneys levied by virtue of a *fi. fa.*; in the contest before the Court for that sum between the execution creditor and the counterclaimant, the right to begin rests with the latter.

In ordinary cases under this Act the Sheriff is not entitled to his costs.

Form of order directing an issue between the adverse claimants

The time for disputing the Sheriff's right to the protection of the Court is when he first applies for the order to interplead. If the adverse claimants have appeared in Court upon that motion, it is too late for them afterwards to impugn the Sheriff's right to relief when the money has been lodged in Court.

On the 6th of July 1848, a commission of bankruptcy issued against the defendant Samuel Handy; when it opened on the 14th, it transpired that the defendant John Handy was in partnership with his brother Samuel Handy; the commission was superseded and a new commission issued against both brothers on the 25th of August, on which they were found bankrupts on the 15th of September. The latter commission was admitted to have been founded upon a declaration of insolvency made by the bankrupts upon the 14th of August. It was however contended that the affidavits disclosed facts amounting to an earlier act of bankruptcy, of which the plaintiffs had notice previously to their issuing executions on the 8th and 9th of June, under which the Sheriff sold the goods of the defendants upon the 12th and 13th of June. Robert Geoghegan, in his character as assignee under the joint commission of bankruptcy, required the Sheriff to pay over to him the sums levied. In consequence of the conflicting claims of the plaintiffs and the assignee, the Sheriff on a previous day in this Term, by a special motion, at which all the parties were represented by Counsel, applied for and obtained an order giving him liberty to lodge in Court the moneys levied, and directing the assignee and the plaintiffs to show cause upon this day why they should not maintain or relinquish their respective claims, and why the Court should not make such order thereon as to them should seem meet, pursuant to statute 9 & 10 Vic. c. 64. All proceedings were in the meantime stayed, and the order directed to be served upon all the claimants.

*J. D. Fitzgerald*, and *Alexander*, for the plaintiffs, contended that the Sheriff had delayed too long in seeking the assistance of the Court.

M. T. 1848.  
Common Pleas.  
ALEXANDER  
v.  
HANDY.

*Sed per Curiam.*

He has already obtained it; your opportunity for making this objection was upon the last day that this matter was before the Court. We cannot now reconsider the propriety of our former order.

Counsel for the plaintiffs then were about to enter into the merits of the case, and to assert their right to the fruits of their executions, when—

*Darley* and *Creighton*, for the assignee, insisted upon their right to begin, which was allowed by the Court.

The case was argued at great length upon both sides, and eventually the Court ordered that an issue should be tried, in which the assignee of the bankrupts should be plaintiff, and the execution creditors (the executors of John Alexander) should be defendants; and accordingly, that pursuant to the statute a writ of summons should issue, directed to the Sheriff of the county of Kilkenny, such trial to take place at the next Assizes for that county; and the question on that trial to be, whether the goods sold under the executions were, at the time of the seizure thereunder, the property of the assignee? The Court reserved the consideration of all questions of costs, as between the rival claimants, until the determination of the issue.

*Hickey*, for the Sheriff, applied for his costs hitherto incurred.

*Alexander.*

Under the Interpleader Act in England, which is similar to the 9 & 10 Vic. c. 64, the Sheriff has frequently been held not to be entitled to costs: *Bowdler v. Smith* (a); *Morland v. Chitty* (b);

(a) 1 Dowl. Pr. Ca. 418.

(b) 1 Dowl. Pr. Ca. 520.  
42 L

M. T. 1848. *West v. Rotheram* (a); *Jones v. Lewis* (b); *Armitage v. Foster* (c);  
*Common Pleas. Blackham on Interpleader*, p. 35; *Murdock v. Taylor* (d).

ALEXANDER

v.

HANDY.

*Hickey* mentioned an unreported case in the Court of Queen's Bench in this country, and the case of *Burke v. D'Arcy* (e), in both of which the Sheriff was allowed his costs.

DOHERTY, C. J.

In ordinary cases it seems to be the uniform practice in England to refuse costs to the Sheriff. The statutes in both countries being similar, there is no good reason why a different rule should prevail here. We do not say, however, that there might not be circumstances under which the Court would depart from that course. Let it be added to the order already made in the present case, that the Sheriff is not to have any costs.

(a) 2 Bing. N. C. 527.

(b) 8 M. & W. 264.

(c) 1 Har. & Woll. 208.

(d) 8 Scott, 604.

(e) 9 Ir. Law Rep. 287.

## AGAR v. PHAIRE.

Nov. 25.

This Court will not allow a *scire facias* to issue for the revival of a judgment, where that judgment has been assigned, and there has not been any payment on foot of it to the assignee, unless there be some evidence, other than the affidavit of the assignee, to show that there was something due on foot of the judgment at the time of the assignment. Where it appeared that the conuzor was a party to the deed of assignment, by which the assignor covenanted that there was a sum then due on foot of the judgment, the Court considered that there was sufficient evidence.

IN Easter Term 1831, Sarah Adair obtained a judgment in this Court against Robert W. Phaire for the penal sum of £1000 debt and costs.

By deed of the 25th of June 1846 Sarah Adair, in consideration of £541. 3s. 11d., assigned the judgment, with all the interest then

due and to grow due thereon, to the Honorable and Venerable James Agar, by which deed (to which the conuzor Robert W. Phaire was a consenting and executing party) Sarah Adair covenanted that there was then due and owing upon foot of the judgment the sum of £541. 3s. 11d. for principal, interest and costs. A memorial of the assignment was perfected and enrolled pursuant to the statute. The judgment had been redocketed on the 28th of October 1844, and was registered on the 29th day of October 1845.

M. T. 1848.  
Common Pleas.  
AGAR  
v.  
PHAIRE.

The assignee, Mr. Agar, stated in his affidavit that the sum of £541. 3s. 11d., and interest (on so much of that sum as was principal money) from the 25th of June 1846, the date of the deed of assignment, was still due and owing to him over and above all just and fair credits and allowances, and that the conuzor was still living.

*Keown* now, on behalf of the assignee, moved for leave to issue a *scire facias* to revive the judgment; and relied upon the case mentioned in the note to *O'Shaughnessy v. Cripps* (a).

DOHERTY, C. J.

In ordinary cases, where there has not, subsequently to the assignment, been any payment of interest or other payment on foot of the judgment, we require either an affidavit from the assignor or some other evidence, to show that there was, at the time of the assignment, something due upon the judgment. In the present case that evidence is supplied by the conuzor himself, inasmuch as he appears to have been a party to the deed of assignment, in which there is an express covenant by the assignor that a sum was then due upon the judgment. This satisfies our rule; therefore you may

Take the order.

(a) Smythe, C. P. Rep. 5.

H. T. 1849.

*Common Pleas.*

## ALLINGHAM v. WALKER.

Jan. 17, 20, 23.

**Assumpsit** by indorsee against acceptor of a bill of exchange for £74. 11s. Plea, that defendant accepted a bill of exchange stamp in blank, upon agreement that A and B should draw upon the stamp a bill for £65. 1s. 2d., but that, without the knowledge or assent of the defendant, A and B drew upon the stamp a bill for £74. 11s. and indorsed it to the plaintiffs, who had due notice of the matters aforesaid. Replication *de injuriâ suâ propriâ*. Held, upon special demurrer to the replication, that it was ill, forasmuch as the plea contained no admission of the contract declared upon.

Held also, that a special demurrer to the plea would have been allowed, because it amounted to the general issue and was an argumentative denial of the acceptance, but, that as the defect was in form only, the plaintiffs could not fall back upon it.

The plaintiffs had moved to set aside the demurrer to the replication as frivolous; the Court ordered it to be set down for argument and reserved the question as to the costs of the motion. Although the defendant was successful upon the demurrer, yet it appearing upon affidavits that the plea was a sham plea, the Court refused him the costs of the motion to set aside his demurrer as frivolous.

**ASSUMPSIT**, upon a bill of exchange for £74. 11s., drawn by the firm of Hamilton and Ruskell upon and accepted by the defendant, payable three months after date, and indorsed by Hamilton and Ruskell to the plaintiffs.

Plea—"And as to the cause of action in the first count of the declaration mentioned, the defendant says that heretofore, to wit, on, &c., to wit, at, &c., he the defendant delivered to the said persons using the name, style and firm of Hamilton and Ruskell, a bill of exchange stamp of the amount of four-and-sixpence, accepted in writing, and in blank, by the defendant; and it was then and there agreed by and between the defendant and the said Hamilton and Ruskell, that they should draw on the said stamp their bill of exchange, and thereby require the defendant to pay to their order the sum of £65. 1s. 2d. three months after date thereof, to wit, the 19th day of December 1846. And the defendant says that the said Hamilton and Ruskell, without the knowledge or assent of the defendant, then and there drew on the said stamp their bill of exchange, and thereby required the defendant to pay to their order £74. 11s. three months after the date thereof, to wit, the 19th day of December 1846, and afterwards, to wit, then and there indorsed the same to the plaintiffs, who then and there had due notice of the aforesaid matters in this plea set forth." Verification and prayer of judgment.

Replication, *de injuriâ suâ propriâ*, &c.

Demurrer to the replication, assigning as special cause that the

plea "is in discharge of the plaintiff's cause of action, and that it denies the plaintiff's cause of action, and that it is not by way of confession and avoidance; and also, for that the said replication "is, in other respects, uncertain, informal and insufficient."

H. T. 1849.  
Common Pleas.  
ALLINGHAM  
v.  
WALKER.

*Brooke* moved that the demurrer should be set aside as frivolous, or that it should be set down forthwith for argument.

*Codd* said that he had certified that the demurrer was arguable, and he still maintained that it was, and that the Courts in this country never set aside demurrers as frivolous.

*Per Curiam.*

Let it be set down for argument upon the next day for hearing law arguments. We shall not dispose of the question as to the costs of this motion until the demurrer has been argued.

*Cuffe*, with whom was *Codd*, for the demurrer.

Jan. 20.

The plea being an argumentative denial that the defendant ever accepted the bill of exchange, the replication is bad; *de injuriâ* cannot be replied to a plea denying, or amounting to a denial, of a material averment in the declaration: *Elwell v. Grand Junction Railway Company* (a); *Schild v. Kilpin* (b); *Pelley v. Rose* (c); *Solly v. Neish* (d); *Simons v. Lloyd* (e). In *Fisher v. Wood* (f), which was an action of assumpsit by the drawer against the acceptor of a bill of exchange payable one month after date, the defendant pleaded that he accepted the bill in blank, and consented that the plaintiff should draw thereon a bill at two months, but that the plaintiff "in violation of the said purpose made the said bill of exchange payable one month after the date thereof." It was held that *de injuriâ* was a bad replication to that plea, which in no

(a) 5 M. & W. 669.

(b) 8 M. & W. 673.

(c) 12 M. & W. 435.

(d) 5 Tyr. 625.

(e) 2 Dowl. & L. 981.

(f) 1 Dowl. N. S. 54.

H. T. 1849. *Common Pleas.* respect differed from the plea here except that the alleged alteration there was in the date, and here it is in the amount. Even supposing our plea to be bad as amounting to the general issue, the plaintiff cannot fall back upon it, inasmuch as such a vice is ground for special demurrer only: *Parker v. Riley (a)*.

ALLINGHAM  
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WALKER.

*Robert Johnston*, with whom was *Brooke*, in support of the replication.

We are in the novel position of being obliged to defend the plea of our opponent filed for the purpose of provoking a demurrer and thus creating delay. Pleas in confession and avoidance are of two kinds, viz., first, either in justification and excuse of the matters alleged in the declaration, or secondly, in discharge of the cause of action by subsequent matter. Each of these pleas admits the contract, but avoids it by new matter. Of the first kind is the plea here, which admits the acceptance, the gist of the action, but avoids it by stating the subsequent unauthorised introduction of a larger sum than that agreed upon. Formerly such a defence must have been pleaded specially, as it is in this case, but by a relaxation of practice it became allowable to give it in evidence in this country under the general issue (in England also until the *Reg. Gen.* of Hilary Term 4 *W.* 4), consequently such special pleas as the present had fallen into disuse. In Ireland however the defendant has always had the option of pleading matter in confession and avoidance specially: 1 *Chitty on Pleading*, pp. 513, 515, 556, 5th ed., and now in England it is absolutely necessary that he should do so: *Reg. Gen.* Hilary Term, 4 *W.* 4. The defence here put forward by the defendant is in fact neither more or less than a plea of fraud upon the part of plaintiffs, and to such a plea the replication *de injuriâ* is good: *Cowper v. Garbett (b)*. That was an action by the payees against the maker of a promissory note; the defendant pleaded that the plaintiffs procured the defendant to make the note by fraud, and that the defendant was induced to make and deliver it by such

(a) 3 M. & W. 230.

(b) 13 M. & W. 33.

fraud, and there never was any consideration or value for the making and payment by the defendant of the note. To that plea the replication *de injuriâ* was held good, Pollock, C. B., saying :—  
 “But though these circumstances (fraud or illegality in the original “creation of the bill) render the contract not binding, and so “amount to a denial that there was a binding contract, they admit “a contract in fact and excuse its performance.” And he proceeds to show that there is no difference where the fraud or illegality is between the original parties to the bill of exchange who are also the parties to the action, notwithstanding the *dictum* of Parke, B., in *Humphreys v. O’Connell* (a) and *Parker v. Riley* (b), relied upon to the contrary. *Fisher v. Wood* was cited in *Couper v. Garbett*, and is virtually overruled by that case. Moreover there was no actual decision in *Fisher v. Wood*; it was merely the advice of a single Judge to amend. To the same effect as *Couper v. Garbett* with respect to fraud is *Noel v. Rich* (c), with respect to fraud and want of consideration is *Isaac v. Farrag* (d), and with respect to illegality and want of consideration is *Scott v. Chapelow* (e), which was an action between the original parties to the bill.

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In *Tolhurst v. Notley* (f), the Court of Queen’s Bench affirmed the decision of Erle, J., setting aside a demurrer to the replication *de injuriâ* to a plea of fraud, in an action of assumpsit by indorsee against the maker of a promissory note. Parke, B., has overruled the doubt which he intimated in *Humphreys v. O’Connell*, and that of the Court in *Parker v. Riley*, and held that a plea which admits a contract in fact, either express or implied, and seeks to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by the replication *de injuriâ* in an action even between the original parties to the contract: *Bennett v. Bull* (g). To the same effect as to illegality is *Lansdale v. Clarke* (h).—[BALL, J. The difficulty which I feel is, that the

(a) 7 M. & W. 370.

(b) 3 M. & W. 230.

(c) 5 Tyr. 632; S. C. 2 Crompt., M. & R. 360. (d) 1 M. & W. 65.

(g) 1 Wels. H. & G. 593; S. C. 11 Jur. 1067.

(e) 4 Man. & Gr. 336.

(f) 17 L. J., N. S., Q. B. pt. 2, 97.

(h) 1 Wels. H. & G. 78.

H. T. 1849.  
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contract as alleged by the declaration does not seem to be admitted by the plea. The admission of an acceptance in blank, with an agreement for the introduction of a certain sum, can scarcely be considered an admission of acceptance of a bill for a different amount.]—In *Noel v. Rick* (a) Abinger, C. B., says: "If a man puts his name to a negotiable bill, a *prima facie* promise to pay the holder results as a matter of law from the nature of the bill. Every defence short of denying his signature is properly matter of excuse for not performing his promise." And again, "The defendant does not deny the indorsement of the bill by him, which is a *prima facie* promise to pay it to the holder, but he pleads facts as a reason for breaking it, to which the plaintiff replies that they are not true. That replication appears to me good." The replication there was, "that the defendant broke his promise without the cause alleged;" it was demurred to upon the ground that the general replication *de injuriâ* in assumpsit was bad. If a man chooses to give an acceptance in blank, and the party to whom it is given draws upon it a bill for a larger amount than that agreed upon, and then indorses the bill to A, who has no notice of the fraud, the acceptor would be liable upon the bill to A. It is impossible therefore to consider the signature, alleged by the plea to have been attached to the blank stamp, as otherwise than a full acceptance, inasmuch as a liability upon the bill was at that moment incurred; and that acceptance the plea admits. There undoubtedly is, at the moment of such an acceptance, a contract in fact between the acceptor and all future indorsees without notice of the fraud, although in point of law the acceptor would not be bound to pay the drawer committing the fraud, or his indorsees with notice of that fraud.

*Codd*, in reply, cited *Grout v. Enthoven* (b) to show that his plea was an argumentative denial of the acceptance, and *Whittaker v. Moore* (c) to show that *de injuriâ* was a bad replication to it.

(a) 5 Tyr. 632; S. C. 2 Cr. M. & R. 366. (b) 1 Exch. R. 382.

(c) 2 Bing. N. C. 359.

The second rule in *Crogate's case* (a) he also referred to, and said that *Couper v. Garbett* and the other cases cited for the plaintiffs really admitted a contract, and therefore rested upon quite a different footing from *Fisher v. Wood*, which, if it could be shown to have been overruled, he was quite willing to give up the present case.

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DOHERTY, C. J.

There is nothing irreconcilable in the decisions which have been brought to the notice of the Court during the progress of the argument. The principle laid down by Baron Parke in *Fisher v. Wood* is consistent with the soundest rules of pleading; that case, being substantially the same as the present, must govern our judgment here. The plea would have been bad upon special demurrer, because it amounts to the general issue, and is an argumentative denial of the acceptance; the plaintiffs have, however, pretermitted their opportunity for objecting to its invalidity by replying *de injuriâ*, which is clearly a bad replication to a plea denying the contract sued upon.

BALL, J.

The *dictum* of Lord Abinger in *Noel v. Rich*, that "every defence short of denying the signature is properly matter of excuse for not performing the promise," might, at the first glance, seem to go some length in support of the argument for the plaintiffs, namely, that the admission of an acceptance in blank sufficiently recognizes the existence of the contract declared upon; but an examination of that case shows that a contract had there been actually entered into, and that the occurrence of matter *ex post facto* was relied upon as vitiating that contract. This fact, together with the context of Lord Abinger's judgment, in which he prefaces the *dictum* referred to by saying, "If a man puts his name to a negotiable bill," &c., explains that *dictum*, and shows that he did not contemplate such a case as the present, which is that of a man putting his name, not to a negotiable security, but to a blank piece of paper.

(a) 8 Rep. 66.

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JACKSON, J.

We have decided this case upon the authority of *Fisher v. Wood*, being of opinion that in none of the subsequent cases which have been cited does there appear to be any intention to disturb that decision, in the propriety of which I concur, as it is based upon the inapplicability in assumpsit of the replication *de injuriâ* to a plea in which the promise is not admitted. The defendant accordingly succeeds upon the demurrer, with costs, but we grant leave to the plaintiffs to amend.\*

*Codd* asked for the costs also of the motion to take the demurrer off the file as frivolous.

*R. Johnston*, contra.

The plea is false, and imputes to the drawers a crime little short of forgery. That it is a sham plea appears from the affidavit of Mr. Hamilton, one of the drawers.

Counsel was about to read the affidavit, when, at the request of the defendant's Counsel—

DOHERTY, C. J., said, let this part of the case stand over in order that there may be an affidavit made on the part of the defendant, in explanation of the facts now insisted upon as disentitling him to the costs of the motion.

Jan. 23.

Upon this day, on the part of the plaintiffs, was read the affidavit of Mr. Hamilton, one of the firm of Hamilton and Ruskell, in which he stated that he was acquainted with the handwriting of the defendant, who in December 1846 forwarded to the said firm his acceptance to their draft bearing date the 19th of December 1846, for £74. 11s., and deponent said that the said acceptance was in the handwriting of the defendant, as were also the figures in the corner

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\* Amongst the recent decisions as to when *de injuriâ* may be replied, will be found *Washbourn v. Burrowes* (1 Exch. B. 107); *Mortimer v. Gell* (4 C. B. Rep. 543); *Herbert v. Sayer* (5 Q. B. Rep. 965); *Robinson v. Little* (13 Jur. 147).

of the bill, namely, £74. 11s., and as was also the date of the bill, and that the acceptance for the said sum of £74. 11s. was given in renewal of a former bill, dated the 19th of September 1846, for £73. 9s., with interest, and that the sum of £74. 11s. was fairly due to the firm when they indorsed the bill to the plaintiffs for full and valuable consideration; and that the acceptance for £74. 11s. was the acceptance on which the plaintiffs had filed their declaration in this action; and that it was wholly untrue that any agreement either verbally or otherwise was entered into between the defendant and this deponent and his co-partner that they should draw on the stamp, on which the acceptance was so written, their bill of exchange for £65. 1s. 2d., or for any other sum than the sum of £74. 11s., which was written as aforesaid by the defendant on the said stamp.

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*Codd*, in support of the defendant's right to the costs of the motion to set aside the demurrer as frivolous, read the affidavit of this attorney, which, in substance, stated that the deponent wrote to the defendant, who resided in England, informing him that the action was brought to recover the amount of his acceptance for £74. 11s., and urging upon him the necessity of settling same in order to stop the expense of litigation. In reply, deponent received several letters from the defendant, especially one of the 9th of November 1848, and another of the 13th of the same month in which the defendant stated that the amount due by him to the plaintiffs was £65. 1s. 2d., and that he had accepted a bill for that sum; but that any other acceptances were blank acceptances, filled up after they had been received, for the amount to be recovered in the present action. This affidavit also stated that the defendant directed the deponent to give a plea of confession for £65. 1s. 2d., as the defendant could not liquidate the debt in consequence of his inability to collect his Irish rents, and he requested the deponent to obtain as much time as possible for payment of the demand. Deponent further said, that the plaintiff's attorney refused to accept a plea of confession for £65. 1s. 2d. and interest, and that deponent laid the foregoing facts before Counsel, together with all the letters of the

H. T. 1849. defendant on the subject, with instructions to prepare such <sup>plea</sup>  
*Common Pleas.* as Counsel thought proper, under the circumstances now detailed  
 ALLINGHAM in this affidavit.  
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The defence was wholly unwarranted by the letters of the defendant.

In reply to this observation of the Court, it was remarked that it would be difficult to say what other plea the attorney could have put in, under the circumstances mentioned in the letters, and that the Court would not try the truth of the plea upon affidavits.

DOHERTY, C. J.

We do not wish to be considered as now especially singling out the attorney of the defendant for censure. We decline to allocate the discredit in this case. The party has been successful in causing the plaintiffs to fall into a trap carefully prepared for them, by a dexterous use of the rules of pleading. So far he has gained a victory; but we are determined that he shall not bear away all its spoils in triumph. Now that the whole case is open to us, and that the plea manifestly appears to have been false, we refuse to the defendant the costs of the motion to set aside his demurrer as frivolous; our only regret is, that we cannot compel him to pay the costs of all proceedings taken in the cause up to the present day.

JACKSON, J.

There is not an attempt to contradict the statements in the affidavit of Mr. Hamilton, and it cannot be said that ample opportunity was not given to the defendant to meet those statements if he could. Beyond all doubt there has been a sham plea filed in this case.

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Assignee of LYNCH v. KENNEDY.\*

Jan. 23.

SCIRE FACIAS upon a judgment (on confession) recovered in Trinity Term, 4 W. 4, for £1800 debt and £2. 2s. 8d. costs, by Francis Lynch against J. M. Kennedy. The *scire facias* contained the following averment:—"And the said Francis Lynch afterwards "came into our said Court, and by deed duly executed according to "the form of the statute and soforth, assigned, transferred and "made over the judgment debt and damages aforesaid to Edmond "Morrogh, of, &c.; as by the memorial and record thereof remaining "in our said Court, as of Trinity Term, in the eighth year of our "reign, manifestly appears," &c. &c.

The defendant's plea was *executio non*—"Because he says that "the said Francis Lynch, in said writ of *scire facias* mentioned, did "not assign, transfer or make over the said alleged judgment debt "and damages in the said writ of *scire facias* mentioned to the said "Edmond Morrogh in manner and form as in the said writ of *scire facias* is alleged; wherefore he prays judgment if the said Edmond "Morrogh ought to have execution for the debt and damages in the "said writ of *scire facias* mentioned, against him the said J. M. "Kennedy, and soforth."

To this plea the plaintiff Edmond Morrogh demurred, assigning as special cause that it sought to traverse the assignment, and thus put in issue and have tried by the country a fact which is matter of record and triable only by inspection of the record itself; and that by traversing the deed of assignment the plea tendered an immaterial issue; and that it traversed a matter of fact alleged in the *scire facias*, and did not conclude to the country, but concluded to the Court. The demurrer assigned several other special causes which it is needless to detail here.

Joinder in demurrer.

\* TORRENS, J., absent in consequence of illness.

*Scire facias* issued at the suit of A B, the assignee of a judgment, averring in the ordinary manner the execution, by the conuzee, of the deed of assignment, and according to the form of the statute, "as by the memorial and record thereof remaining in our said Court, &c., manifestly appears." Plea, *executio non*, because the conuzee did not assign, transfer, or make over the said alleged judgment debt and damages in the *scire facias* mentioned to the said A B *modo et forma*, &c., concluding with a prayer of judgment. Held on special demurrer, that the plea was bad.

H. T. 1849. *J. E. Welsh*, for the defendant, was called upon by the Court to  
*Common Pleas.* support the plea.

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KENNEDY. 9 G. 2, c. 5 (*Ir.*), will, we admit, show *dicta* opposed to the validity of such a plea as the present. In every instance it will be found that those *dicta* were extra-judicial. In none of the reported cases was the subject for determination the same as that now at bar. In *Hobhouse v. Hamilton* (a) and *Malcolmson v. Gregory* (b), the actual decision was merely that an attested copy of the memorial of the assignment of a judgment is evidence of the fact of that assignment. *Maguire v. Armstrong* (c) rules that similar evidence was good to show that the sum mentioned in the assignment is due upon the judgment. It was held in *Barry v. Hoare* (d) and *Bruce v. Cooke* (e), that the assignee need not make profert in his *scire facias* of the deed of assignment. The last named case, and *Creagh v. Fulton* (f), hold it to be unnecessary to aver that the memorial was executed with the formalities directed by the statute. Two pleas, specifying defects in the memorial, were, in *Watters v. Lidwill* (g), held ill as amounting to pleas of *nul tiel record*. Three of the Judges there slightly glanced at those pleas, merely for the purpose of disposing of the costs with respect to them; and BALL, J., refrained from giving any opinion on any but the main question in the case—viz., that arising upon the Statute of Limitations. Even if the Court should be of opinion that the principle of the foregoing cases applies to this case, we are prepared to show that neither the principle, nor the cases in support of it, have any solid foundation. *Hobhouse v. Hamilton*, which formed the groundwork of all the other cases heretofore named, betrays by internal evidence decisive marks of carelessness and want of consideration. Lord Redesdale, amongst his other purely extra-judicial observations, compares the case to that of enrolment of bargains and sales; which bargains and

(a) 1 Sch. & Lef. 207.

(b) 1 H. & Br. 310.

(c) 1 H. & Br. 313, n.

(d) 4 Ir. Law Rep. 97.

(e) 1 H. & Br. 318, n.

(f) 5 Ir. Law Rep. 322.

(g) 9 Ir. Law Rep. 362

sales we shall hereafter show may be controverted in pleading: with reference to the same subject, he says that there are numerous cases in the Year Books; however, the Year Books ceased before the passing of 27 *Hen.* 8, c. 16, the statute which prescribes the enrolment of bargains and sales. Forasmuch as the subsequent cases are mere echoes of *Hobhouse v. Hamilton*, they must fall with it if its authority be once sapped. The *dicta* of Lord Redesdale are at direct variance with the statute 9 *G.* 2, c. 5 (*Ir.*), itself. Throughout it the intention is manifest to render the memorial simply auxiliary and secondary to the assignment. In the 1st section it is enacted that "where any conuzee, &c., of a judgment, &c., "shall assign the same to any person or persons whatsoever, such "conuzee, &c., shall also perfect a memorial of such assignment, "&c." Here, so far from superseding the authority of the assignment, the memorial evidently appears to be only subsidiary to it, there cannot be any other import in the word "also;" moreover the assignment and memorial are treated as quite distinct things, the latter being the appendage to the former, the contents of the latter being supplied from the former; amongst which necessary contents of the future memorials are enumerated the day and year when the assignment was "perfected;" the statute thus speaks of the assignment as perfected before the memorial exists. The affidavit required to be made is of the "true perfection of such assignment and memorial;" and the officer is directed to indorse on the assignment the date of the lodgment of the memorial. Not a trace of intention is visible on the part of the Legislature to merge the assignment in the memorial; on the contrary the statute is sedulous to preserve the individuality of each; the statute merely imposes an additional ceremony. In aid of the opposite construction, the incontrovertibility of the memorial as a record has often been insisted upon, but there is a wide distinction between a record and a thing recorded.

In England there are four species of assurances by record; first, annuities; second, bargains and sales; third, fines and recoveries; and fourth, letters patent.

First, the statute 17 *G.* 3, c. 26, formerly, and the 53 *G.* 3, c. 141,

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now, requires the enrolment in Chancery of a memorial of every deed, bond, instrument or other assurance whereby any annuity should be granted, otherwise such deed, &c., shall be null and void to all intents and purposes whatsoever. As by the statute 9 G. 2, c. 5, with respect to judgments, so by the Annuity Statutes, it is prescribed that the memorial enrolled should comprise certain requisites. There is no difference, apparent on the statute, between the two cases, as to the conclusiveness of the memorial as a record. The only important distinction between the two cases is, that the 9 G. 2, c. 5, gives the assignee of the judgment, on completing the memorial, a right, which he had not previously, to sue at law, while the Annuity Acts deprive the grantee of a right, which he otherwise would have, if the memorial be not made; but omission to memorialize is equally fatal in both cases, as the construction put on the Acts is, that nothing dispenses with the memorial at law. It is the constant practice in annuity cases to plead *non est factum* to the grant of the annuity, and pleas of non-compliance with the Act respecting the memorial: 3 *Chitty on Pleading*, 5th ed., p. 975, *et seq.*: *Hickes v. Cracknell* (a).

Secondly, deeds of bargain and sale are enrolled in obedience to stat. 27 Hen. 8, c. 16, which prevents any freehold estate from passing under the deed, unless it be enrolled in the manner pointed out by the Act. There is no distinction between enrolment in this case and that under 9 G. 2, c. 5. In the precedents we find the deeds of bargain and sale pleaded and profert thereof made: 2 *Chitty on Pleading*, 5th ed., p. 576; *Took v. Glascock* (b); *Jefferson v. Morton* (c). In *Wood v. Longueville* (d), a bargain and sale is pleaded and stated to have been enrolled. In these cases *non est factum* to the deed, or that the enrolment was not in conformity with the deed, might well be pleaded. It was held in *Rex v. Hopper* (e) that the date of the enrolment is a part of the record and cannot be averred against. Graham, B., there takes the true distinction; he says, "I am of opinion that, as to all that relates to the

(a) 3 M. & W. 72.

(b) 1 Saund. 251.

(c) 2 Saund. 11, b.

(d) 2 Saund. 275.

(e) 3 Price, 495.

"fact of enrolment it must be treated as a record, and I take it that  
 "from its very nature it must be so considered. The distinction is  
 "plain. The instrument itself is not a record; the certificate of its  
 "having been enrolled is." He also there admits that the old autho-  
 rities, upon even the question of conclusiveness of the record as to  
 the fact of enrolment, were contradictory. Therefore, according to  
*Rex v. Hopper*, though the fact of enrolment, or the date of it,  
 cannot be traversed *in pais*, yet the execution of the deed, or  
 any thing stated in the deed, may be counterpleaded.

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Thirdly, fines and recoveries. It is not easy to suggest what  
 under this head would be matter recorded, as distinguished from  
 matter of record, but there are some instances. If any of the pro-  
 clamations upon a fine be entered to be made upon a Sunday, they  
 may in an action of *formedon* be avoided by plea as well as by writ  
 of error: *Fish v. Broket* (a). In a similar action, there will be  
 found in 10 *Wentworth*, p. 177, to a plea of a fine, a replication  
 that the premises demanded were not comprised in the fine. The  
 reasoning from the law with respect to fines appears *a fortiori* to the  
 present case, because we cannot have relief except by special motion,  
 whereas in the former case there may be a writ of error.

Fourthly, letters patent. Against the King's letters patent showed  
 in Court none can deny them, but *non concessit per prædictas*  
*litteras patentes* is a good plea, for although there be such letters  
 patent, yet, perhaps nothing pass by them; and so *per consequens*  
*non concessit*: *Hynde's case* (b); and to the same effect are *Rolle's*  
*Ab. tit. Estoppel*, B. 2, 3, 4; *Co. Lit.* 125 b, 260 a. Inasmuch as  
 letters patent are in the nature of a conveyance, the operation  
 thereof may be denied: *Co. Lit.* 260, a; *Doct. Plac.* 307, 308.  
 This doctrine is precisely applicable to the assignment of judgments.  
 Counsel also mentioned *Karne v. Pryther* (c).

In our favour is the language of Pennefather, C. J. (d), in  
*Creagh v. Fulton*, where he treats it as clear that there may be a  
 special plea that the assignment or memorial is defective in point of

(a) Plowd. 266.

(c) Cro. Jac. 375.

(b) 4 Rep. 71, b.

(d) 5 Ir. Law Rep. 327.

H. T. 1849. form, if the defect does not appear on the face of the record. In  
*Common Pleas.* *Malcolmson v. Gregory* (a), there was a plea of *nul tiel assignment*  
 LYNCH similar to that here, and it was passed over without objection. The  
 v. tradition of a case of *Butler v. Edwards* (mentioned in *Bruce v.*  
 KENNEDY. *Cooke* (b), itself but a hasty note), in which such a plea is said to  
 have been held ill, cannot be treated as of any weight. *Boyle v.*  
*Ferrall* (c) was mentioned.

*W. Sadlier and Napier*, for the plaintiff, relied on *Hobhouse v.*  
*Hamilton* (d); *Malcolmson v. Gregory* (e); *Bruce v. Cooke* (f);  
*Butler v. Edwards* (g); *Maguire v. Armstrong* (h); *Barry v.*  
*Hoare* (i); *Watters v. Lidwill* (k); and *Creagh v. Fulton* (l): and  
 were stopped by the Court.

DOHERTY, C. J.

It was impossible to hear the arguments adduced by Mr. *Walsh* in support of the plea, and not to have been struck with them, both those upon the language of the statute, and those resting upon analogy to other instances in which enrolment takes place. But the general doctrine laid down by Lord Redesdale in *Hobhouse v. Hamilton*, nearly half a century ago, and the subsequent train of decisions, in which the principle then laid down has been acted upon and acquiesced in, we feel to coerce us in the present case. True it is, perhaps, that in no fully reported case did the exact point now before us present itself for direct adjudication; but the principle which must rule it was that discussed and laid down by Lord Redesdale, and afterwards adopted by the Courts of Law. Were we to allow this plea to prevail, we feel that we should act in absolute contravention of that principle, and that such a decision could not be reconciled with the existing cases upon the statute.

(a) 1 H. & Br. 310.

(c) 12 Cl. & F. 740.

(e) 1 H. & B. 310.

(g) *Ubi. supra.*

(i) 4 Ir. Law Rep. 97.

(b) 1 H. & Br. 319, n.

(d) 1 Sch. & Lef. 207.

(f) 1 H. & B. 318.

(h) 1 H. & B. 313.

(k) 9 Ir. Law Rep. 362.

(l) 5 Ir. Law Rep. 322.

What the practice was before *Hobhouse v. Hamilton*, it now might be difficult to ascertain. The present practice, however, seems to us to be both highly convenient and safe ; and were the matter now *res integra*, and not concluded, as we deem it to be by former judicial determination, it is at the least very doubtful whether we should consider a different course of practice to be sound in law or desirable in fact. With respect to the passage relied upon, as in favour of the defendant, in the judgment of Pennnefather, C. J., the fair construction would seem to be, that he there used the word "assignment" as synonymous with the word "memorial," which at once removes all difficulty as to what he meant. We must allow this demurrer.

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Demurrer allowed.

M. T. 1847.

*Queen's Bench.*

ROE, Lessee of THE MAYOR, ALDERMEN AND  
BURGESSES OF THE BOROUGH OF DROGHEDA,

v.

JOSEPH HOLMES.

*(Queen's Bench.)*

Nov. 22.

A lease was obtained from the Corporation of D. in 1785, by an Alderman of the Corporation, of certain premises, the subject of the ejectment, for a term of sixty-one years, which expired in 1846; this lease vested in a freeman of the Corporation, who, in 1842, prior to the Municipal Act coming into operation in D., surrendered it to the old Corporation on getting from them a new lease for ninety-nine years at nearly one-half the rent reserved in the original lease, on payment of £700 as a fine. In an ejectment on the title to recover possession of these premises brought by the existing Corporation, a resolution of the old Corporation was given in evidence, by which it was referred to viewers and auditors to report what sum of money ought to be paid by way of fine for renewal, and tenants to be entitled to a lease upon the terms specified. *Held*, that the new lease for ninety-nine years was executed in pursuance of the resolution, and not by reason of any particular dealing or original contract entered into or made after the disabling statutes.

*Held also*, that such resolution came within the words of the statute 6 & 7 W. 4, c. 100, "in pursuance of some resolution."

poration claimed to be entitled to leases and renewals of leases of the corporate lands at one-half of what might be ascertained as their annual value, and that this right was grounded on the following resolutions entered in the Corporation book, and that such leases were excepted out of the operation of the statutes against non-alienation :—

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7th October 1796.

**RESOLVED**—That in future all lands, the property of this Corporation, be set for a term of ninety-nine years, and one-half of the rent fined down at twenty years' purchase, and that houses and building ground in this town and suburbs be set for ninety-nine years, and one-half fined down at ten years' purchase.

20th of April 1801.

**RESOLVED**—That it be an instruction from this assembly to the auditors and viewers on reporting upon petitions for renewals of houses, lands and premises, that they shall first take into their consideration and value the said premises at the full value between man and man, and that the petitioner so applying shall then be entitled to a renewal of the lease for ninety-nine years at one-fourth of the full annual value as a rent, and on paying or fining down another or second fourth at seventeen years' purchase for lands, and ten years' purchase for houses; always obliging a petitioner for the renewal of a lease of one house or houses, by special covenant and any other necessary legal deed, to build or rebuild within five years after the expiration of the term of years in *his* old lease, under a forfeiture of his new lease or payment of treble rent, as the Corporation shall or may think fit; giving it also as a matter of instruction to the auditors and viewers, that they specially report on oath, on each particular case, what sum or compensation the petitioner appears to them to be justly entitled to, if any, for the term he proposes to surrender on obtaining a renewal, and that all reports shall hereafter be read at our assembly and taken into consideration not sooner than the next quarterly assembly.

18th of January 1828.

**RESOLVED**—Upon the motion of Alderman Henry Fairtlough, pursuant to notice given at last October assembly, that no lease be

M. T. 1847. granted by this Corporation until the premises are within five  
*Queen's Bench.* years of expiration.

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This being the only question at issue, the Judge, by consent of both parties, directed the jury to find for the plaintiff, reserving liberty to the defendant to apply to the Court above to have such finding turned into a verdict for him; and in case either party was dissatisfied with the adjudication, such party should have liberty to bring a bill of exceptions.

An order *nisi* having been obtained accordingly—

The *Attorney-General* (Moore), with whom was *Napier*, showed cause.

The Irish Municipal Act passed in August 1840, but it did not come into operation in certain boroughs until certain preliminaries were done; it did not come into operation in Drogheda until October 1842. The lease now in question was made in February 1842, and we admit the defendant paid a valuable consideration. Prior to the Municipal Act becoming law, several statutes were passed restraining the alienation of corporate property; the first of these was 6 & 7 W. 4, c. 100, and it was continued by subsequent restraining statutes down to 3 & 4 Vic. c. 109. The 12th section of 3 & 4 Vic. c. 109, raises one of the questions in this case, that is, was the lease in question, which was executed subsequent to the Act, made under any of the excepted provisos in that section? It lies on the defendant to bring himself within some of these exceptions, to show that the resolutions of the Corporation on which he relies are within them. The words in the 6 & 7 W. 4, c. 100, are clear that no conveyance, &c., of any corporate property is to be made except "in pursuance of some covenant or contract, or agreement *bond fide* made or entered into on or before the 16th day of February 1836, by or on behalf of such body corporate, or of some resolution duly entered in the corporate books of such body corporate, on or before the said 16th day of February." Defendant relies on the resolutions entered in the Corporation books. To entitle him to rely on these resolutions, they ought to relate to the particular lands which were to be the subject of the demise made after the passing of

the Act, and in favour of a particular person, not a general resolution. One of the resolutions relied on was passed 7th October 1796, but that resolution could in no way bind the Corporation to grant a specific lease to any particular person. That relates not to renewals but to original leases. Then, there was a resolution of the 20th of April 1801, but that resolution conferred no right. Then, on the 18th of January 1828 another resolution was passed. These were all in reference to general objects, and this lease not coming within any of the exceptions in the 12th section of 3 & 4 Vic. c. 109, cannot be set up as a bar against the Corporation now recovering.

We are referred to the 2nd section of 3 & 4 Vic. c. 108, which is a reservation of all right of property and beneficial exemptions to freemen, but the construction of that section is not to relate to the making of leases or the alienation of property except where the surplus rents were divisible among the members of the Corporation; and though the right of the freeman be saved after any surplus, yet there is nothing in the section applying to leases made by the Corporation. It was equivalent to saying, that if the property of the Corporation amount to a certain sum of money, the right of the freeman is only to the surplus after payment of charges upon the real or personal estate of the Corporation. Then the 140th section of 3 & 4 Vic. c. 108, is plainly applicable only to the new Corporation; it is a restraint upon the power of sale and leasing by corporate bodies, similar to that in the Act of W. 4, and it uses the words "except in the cases hereinafter mentioned," which cannot apply to the old Corporation. The new Corporation have a power generally to make a lease for thirty-one years; they may make a lease for a longer term if there has been any covenant or agreement; or if usage warrant it, they may make a renewal of a lease for years, or for lives. But the lease here is not a lease made by the new Corporation, and cannot possibly be aided by that section.

The lease of 1785, which is the alleged foundation of the present lease, did not contain any covenant for renewal, and the resolution of 1801 cannot apply to a lease which at the time had forty-five years to run. Neither is this resolution such a one as a Court of

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M. T. 1847. Equity would enforce, for it wants all the specific qualities requisite  
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*Tomb, Whiteside and Holmes, contra.*

We contend that this lease of 1842 is a good and valid lease, and comes within the exceptions of that 12th section of the statute; it is strictly within its letter, and clearly within its policy. Down to 1796 the Corporation were in the habit of granting leases of all their lands at their discretion, and their practice was to set up their lands to auction, confining the biddings to the Members of the Corporation. By the ancient laws of the Corporation, there was a claim of right called the freeman's right, which was recognized by several of the resolutions of the Corporation, by which freemen of the Corporation claimed to be entitled to obtain leases and renewals at one-half of their ascertained value. That was such a right on which a freeman's representative would be entitled to ground a claim for a renewal, and it has been recognized as a vested interest. In 1756 one of the resolutions, after stating the petition of Edward Meade, Alderman, setting forth that he was in possession in his own right of certain premises under a lease made for 61 years at the yearly rent of fourteen shillings, and that the said lease is within the rules of renewing, and praying a new lease, says "it is ordered by this assembly that said petitioner be and he is hereby granted a new lease of the said premises in his own name, pursuant to the said report, for 61 years from Michaelmas last, at £1. 10s. per annum, and paying £5 on his surrendering the old lease." Then the resolution of the 20th of April 1801 is clearly within the plain meaning and saving of the restraining Act of Parliament. Then the resolutions of the 29th January 1812 and of the 18th January 1828 and one of 1833 recognized this freeman's right.

These resolutions being thus within the letter of the Act, what then is its policy? In *The Attorney-General v. The Corporation of Dublin* (a), Sir Edward Sugden says:—"The intention of the

(a) 1 Dr. & War. 554.

"Legislature in passing the statute of the 6 & 7 W. 4, c. 100, cannot be doubted; it was to prevent the Corporation from dealing with their property pending the period a reform in the Corporation was under the consideration of Parliament, in a way in which they would not have dealt with it had they not been aware, or at least suspected, that their privileges and their property were about to pass into other hands;" and again he says, "I do not think that the resolution there intended is one which is to be entered in the corporate books, pursuant to a covenant or contract; for in my opinion any claim properly substantiated would be good, though not a covenant or contract, if supported by a resolution duly entered in the corporate books." These general resolutions, applying to all persons and lands, are as clearly within the policy of the Legislature as one personal to the individual. This is not a contract, covenant or agreement, but it is a resolution, and then the question arises, must it be a specific resolution applicable to specific persons, or a general resolution applicable to all lands? Our case is on the 12th section and not on the 140th section. A resolution of 1684 relates to the mode of letting the lands generally, and a resolution of 1785 prohibits persons at auctions or cants of corporate lands, where the right of bidding is confined to free members, taking any lease of such lands in trust for any person not being free, except in the case of minors who may be entitled to their freedom. The resolution of April 1801 was passed with a view of conducting the granting of renewals on fair terms; and it stating that in future any auditor or viewer having a petition of his own for the renewal of a lease is to vacate his place before it be considered, establishes this.

The lease made in November 1785 to William Holmes would have expired in Michaelmas 1846, unless it had been renewed, and the defendant purchased the interest in this lease because the right to renew was given with it. It lies on the plaintiffs to demonstrate that that lease is void under the Act of Parliament. That Act says that a lease to be granted must be in pursuance of something done before 1836; it prescribes no form, and the legislation being thus general, it must apply to a general resolution.

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The 12th section of the Municipal Act is important, for it preserves all lawful purchases, rights, trusts, powers, authorities, properties and estates, now or of late legally vested in or belonging to bodies corporate, &c., subject to such mortgages, charges, debts and incumbrances, rents, contracts, covenants and conditions, as the same respectively now are subject or liable to. It thus takes away the discretionary power of the old Corporations, and they could do nothing but what was obligatory on them. Then by the 115th section, the Corporation are to execute the trusts reposed in them, and the 135th section precludes corporate property being liable for debts not chargeable thereon. But the 140th section is all-important in this case to ascertain the true meaning of the word "resolution." That resolution of 1842, if passed before the passing of the Non-alienation Statute, might have been enough, if it had ascertained and specified all the materials for the lease; but the statute refers to cases where certain matters were done before 1836, and where the Corporations were presumed not to be under any undue bias.

BLACKBURN, C. J.

We think this motion ought to be granted, and that a verdict should be entered for the defendant.

The ejectment was brought to evict a lease obtained by the defendant in the year 1842, from the Corporation of Drogheda, in consideration of the surrender of a former lease, at a rent equal to one-fourth of the ascertained value of the lands, and a sum of money by way of fine. The then Corporation were under the restraint of the statutes against the alienation of corporate property at the time they granted this lease; and the plaintiffs are entitled to recover, unless they were warranted in making that lease. Whether they were so warranted or not depends upon the construction of those statutes. The earliest of these, the 6 & 7 W. 4, c. 100, enacts that no conveyance, &c., of any lands of any of the bodies corporate mentioned in the schedule to the Act, to which on or before the 16th of February 1836 they had any right or title, unless in pursuance of some covenant, or contract or agreement

*bonâ fide* made or entered into on or before the said 16th day of February, by or on behalf of such body corporate, or of some resolution duly entered in the corporate books of such body corporate, on or before the said 16th of February, shall (except as therein-after provided) be made or executed by or on behalf of such body corporate before the 1st of September 1837. This statute was re-enacted annually until the passing of the Corporation Act 3 & 4 Vic. c. 108. It must be conceded that the then Corporation of Drogheda were the uncontrolled owners in fee of this property, and had the right of dealing with it as such, except so far as they were thus disabled. The Act takes away altogether from the then existing Corporations the power of dealing with their property unless in pursuance of some covenant, or contract, or agreement *bonâ fide* made or entered into on or before the 16th of February 1836, or of some resolution duly entered on the corporate books.

It is plain that this lease was not made in pursuance of any covenant, contract or agreement, and that therefore it cannot be supported on that ground. If before the day specified in the year 1836, the defendant had petitioned the Corporation, and such petition had been referred to the auditors and viewers of the Corporation, and the value of the property been ascertained, and a resolution had been entered on the books of the Corporation to that effect, the case would have then rested not upon this resolution alone, but upon a contract mutually binding by reason and by the effect of the presenting of the petition followed by the subsequent Acts. Are we then by the word "resolution" to understand something equivalent to contract? If this were the meaning of the word it must contain the names of the parties, the lands to be demised, the term, the rent to be reserved, and in fact possess all the certainty requisite to form a mutually binding contract, capable of being enforced by either party. I do not think that this was intended by the word "resolution."

The general terms of the section are restrictive of a common law right, and this exception, which restores or preserves that right should be construed liberally; and it seems to me that the word "resolution" fairly admits of a construction which will bring this lease within the exception. There were several resolutions of the

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corporate body in reference to the corporate property, and the mode of dealing with it, which they had full powers to enter into. These several resolutions were given in proof; one of these was that wherever the tenant who held under a lease about to expire thought proper to memorial the Corporation for a renewal, the Corporation entered a resolution on their books, and thereupon it was referred to auditors and viewers to report what sum or sums of money ought to be paid by way of fine for the renewal, and the tenant would then be entitled to a lease upon the terms specified. This was a valid subsisting law of this body corporate when the Act was passed, it was made for the regulation of all their estates, and referring to all their then and future tenants. The lease here was executed in exact pursuance of that resolution, and not by reason of any particular dealing or original contract entered into or made after the disabling Act. The law and the usage founded on this resolution existed and were in operation long before the Act was passed, and the tenant did no more than avail himself of them by petitioning and obtaining the lease in question.

The 140th section of the Corporation Act appears to furnish an inference in support of this lease; it refers, not to the old, but to the new Corporations, and clearly provides for such a case as that before us. According to that section the bye-laws and practice would have entitled the defendant, if the old Corporation had not executed the lease, to have gone to the new Corporation and required them to do so; and though it would not have been obligatory on them to grant the lease, it would be a very violent construction of the Act to hold that a lease in pursuance of this resolution, which if executed by them would be valid, would be invalid because executed by their predecessors. For these reasons I am of opinion judgment should be entered for the defendant.

CRAMPTON, J.

I am of the same opinion. The only question is, whether the lease sought to be affected was or was not made in pursuance of some resolution duly entered on the Corporation books? That the lease in question was made in pursuance of a resolution duly

entered in the Corporation books is not denied. But the plaintiff's objection is, that the resolution appearing in the books is not such a resolution as the statute contemplated; because it is not a specific resolution stating the parties' names, the rent, and other particulars of the lease to be granted. The words of the statute, "in pursuance of some resolution," are large enough to include the resolution relied on, and like the connected words "in pursuance of some covenant, contract or agreement," may fairly import any resolution to grant a lease fairly made by the Corporation and duly entered in their books. The opinion of Sir E. Sugden, in the case referred to by the defendant's Counsel, is favourable to this view. He lays it down that the Legislature, by the statute of 1836, did not mean to avoid any alienation by the old Corporations *bonâ fide* made in pursuance of solemn engagements expressed by resolutions appearing duly entered on the books and founded upon the bye-laws of the Corporation.

The saving for leases made in pursuance "of some resolution" is not only in the statute now under discussion, but it is also found in 3 & 4 Vic. cc. 108 and 109, in the same connexion, and it seems clear that this saving was introduced into the statute in question because the report of the Commissioners upon Municipal Corporations had stated that in several Corporations there were bye-laws and customs by which certain persons had particular rights of renewal; these were not legal but equitable rights only; but they were rights which, by the laws and custom of the Corporations, ought to be enforced.

It is contended by the plaintiff, that though a specific resolution might be binding on the Corporation, and a lease in pursuance of it valid, yet that the Corporation could not be bound by a mere general resolution, and that a lease made in pursuance of such a general resolution could not be valid; but upon this argument "some resolution," as used by the Legislature, becomes without meaning, because where, in pursuance of the tenant's petition, a resolution to grant a renewal was duly entered on the Corporation books, specifying the parties, the time, the rent and other particulars, the transaction would amount to a contract or agreement,

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M. T. 1847. upon which the defendant might file a bill for a specific performance.  
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Further, the resolutions relied on by the defendant are founded on the bye-laws of the Corporation, and it appears that the effect of those bye-laws was to give a right of renewal upon certain terms to the lessees who were members of the Corporation. Upon the faith of those bye-laws and the custom of the Corporation, those leasehold interests were looked upon as being of the nature of perpetuities, and as such were the subject of sale and settlement. By those bye-laws, upon the lessee memorialling the Corporation for a renewal or new lease upon the usual terms, the custom was to refer the memorial to auditors to make a report, and upon that report to execute the lease or renewal according to the established course and custom of the Corporation. This course was strictly pursued in the present instance. There was a memorial, a reference, and a report, and a resolution founded on the report, duly made according to the bye-laws, and the resolution was duly entered in the Corporation books, and all this in exact pursuance of the bye-law and the custom.

The plaintiffs contend that no resolution is binding except it amounts to an actual contract. That argument comes with a bad grace from a party who asserts that the new Corporation have power under the statute to grant at their discretion such a lease as the present. How have they that power? In consequence of the Legislature's recognition of the very bye-law referred to; and yet it is argued that the old Corporation had no such power, although the same bye-law was by them strictly pursued: and it is conceded that the transaction was unquestionably a *bonâ fide* transaction, and that the property has come to the new Corporation precisely in the same state as the old Corporation would have enjoyed it had their existence been continued. I therefore think that the case should be ruled for the defendant.

PERRIN, J.

I concur in the judgment of the Court. In this case it appears there was a certain resolution on the books of the Corporation

governing renewals of leases of a certain date, the lessees of which were entitled to have new leases within five years of the expiration of the original lease, upon certain terms. The defendant purchased the interest in one of the leases, and the term being near expiring he memorialled the Corporation for a renewal, and he brings himself within the terms of the resolution, and then his petition is referred to the viewers and auditors to say whether he is entitled according to the law of the Corporation to this renewal? That law is a resolution entered in the Corporation books, and the auditors report that he is entitled to this renewal, and upon what terms it should be granted. A lease is granted accordingly in pursuance of that report, and it is now said it is not in pursuance of the resolution, because the words "some resolution" might be cut down to mean some particular resolution. The Court will not cut down or supply words to work a great injustice.

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Order absolute with costs.

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NOTE.—In respect of the principle involved in the above decision, see *Taylor v. Dulwich Hospital* (1 P. Wms. 655); *Wilmot v. The Corporation of Coventry* (1 Y. & C. 518); *East London Water Works v. Bailey* (4 Bing. 283; S. C. 12 Moore 533).

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Lessee of THE CORPORATION OF WATERFORD

v.

CHARLES NEWPORT.

T. T. 1846.

May 28.

EJECTMENT on the title, to recover a public weigh-house in the city of Waterford, tried before Doherty, C. J., at the Waterford Summer Assizes of 1845.

All leases exceeding the period limited by the 3 & 4 Vic. c. 109, s. 12, made by a Corporation since 1836, are

void, unless they come under the exceptions in that section.

Where a peculiar jurisdiction is given by statute, that does not exclude the Common Law jurisdiction of this Court, unless there be an express exclusion.

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enjoyed the office of public weighmaster, and until his death in 1842 had occupied the weighhouse in the city of Waterford as tenant to the Mayor, Sheriffs and citizens of the city, at a rent of £50 a-year. He also proved the service of a notice to quit and a demand of possession on the defendant, and then closed his case. The defendant then gave in evidence a lease, bearing date the 5th of July 1842, whereby the then Mayor, Sheriffs and citizens of the county of the city of Waterford demised to the defendant, as public weighmaster of the city, the premises in question, *habendum* for and during the natural life of the defendant, provided he should so long hold the office of weighmaster, at the yearly rent of £50. He also proved his appointment on the 18th of April 1842 by the Mayor and Aldermen of Waterford, sealed with the common seal of the Corporation, to the office of weighmaster, and then closed his case; whereupon Counsel for the plaintiff contended that the lease of the 5th of July 1842 having been granted by the old Corporation of the city, after the coming into operation of 3 & 4 *Vic.* c. 108, and being contrary to the provisions of the 3 & 4 *Vic.* c. 109, was void.

Counsel for the defendant, on the other hand, relied on its validity, and insisted that even though the Judge should be of opinion that it was invalid, it was not competent for the lessor of the plaintiff to impeach the lease in the present action, but that he should have proceeded within the time and in the manner prescribed by the 3 & 4 *Vic.* c. 108. The learned Judge directed a verdict for the plaintiff, and to this direction Counsel for the defendant excepted.

*Harris* and *Napier*, in support of the exceptions, contended, that the present case was not affected by the provisions of 3 & 4 *Vic.* c. 108, s. 140, and 3 & 4 *Vic.* c. 109, s. 12; that it was neither a conveyance, alienation, settlement, charge or incumbrance within the meaning of that latter section, which omits the words "lease" and "demise" used in the prior section, showing the intention of the Legislature that such acts were not to be thereby affected. They cited *Moser v. Newman* (a). Secondly, they contended that even

(a) 6 Bing. 561.

if this lease were impeachable as contrary to the provisions of the Act, the only mode of impeaching it was under the 3 & 4 Vic. c. 108, s. 143, which prescribes a certain mode of proceeding to vitiate such leases, and that the Corporation were bound to adopt that mode, and in support of that objection they relied on *Foster's case* (a); *Attorney-General v. Aspinall* (b); and that there could not be a cumulative remedy; *Doe v. Bridges* (c).

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*Curtis and Lynch*, in support of the verdict, contended that this lease was included in the word "conveyance," used in the 12th section: *Rex v. Justices of Leicester* (d); and that the lease being void *ab initio*, was not affected by the 143rd section of chapter 108; and that even if the lease were only voidable, the jurisdiction of this Court still remained, there being no express authority in the Corporation to make the contract: *Jack d. Uniacke v. Thrustout* (e); *Cates v. Knight* (f).

BLACKBURN, C. J.

We think the direction of the learned Judge was right. In order to arrive at the true meaning of the 12th section of 3 & 4 Vic. c. 109, which has been relied on by the 'plaintiffs' Counsel, it is necessary to advert to a series of statutes of which that statute is but a continuance. In 1836 it appeared right to the Legislature to preserve the property of Corporations in its existing state, prohibiting its alienation for a limited period; and the statute 6 & 7 W. 4, c. 100, was passed for that purpose, and the provisions of that statute were re-enacted from time to time until 3 & 4 Vic., when the Legislature passed the statute 3 & 4 Vic. c. 108; but as that Act was not prospective, it became necessary to pass a protecting statute in order to cover the interval between the passing of that Act and its enactments coming into operation: the policy of the Legislature was the same in the second statute as in the first. This Act (c. 109)

(a) 11 Coke, 59, a.

(c) 1 B. & Ad. 847.

(e) 1 H. & Br. 50.

(b) 1 Keen, 513; S. C. 2 M. & Cr. 613.

(d) 7 B. & C. 12.

(f) 3 T. R. 444.

T. T. 1846. *restrains the alienation of corporate property; and the preamble*  
*Queen's Bench.* to the 12th section recites 6 & 7 W. 4, c. 100, and then enacts  
 CORPORATION OF that no conveyance, alienation, settlement, charge or incumbrance  
 WATERFORD whatsoever, of, out of, or upon any lands, tenements or heredita-  
 v. ments to which any body corporate, &c., or any person in trust  
 NEWPORT. for them, now have or may acquire, shall be made unless in pursu-  
 ance of some covenant or contract, or agreement *bonâ fide* entered  
 into on or before the 16th of February 1836. Now it is insisted  
 that the late Corporation had unlimited power of leasing, and that  
 this was not an alienation within the meaning of the 12th section.  
 But the present lease, though not in form an alienation, is in sub-  
 stance a total evasion of that Act; and we are now called on to  
 restrict the terms of this remedial statute, by which we would totally  
 frustrate its object. The same construction must be applied to the  
 former as to the later statute.

But then it is said that this lease, though prohibited by statute,  
 may still be considered a valid instrument. How could that be? I  
 doubt very much whether the execution of the lease would not sub-  
 ject the parties to an indictment. However, it is enough to say that  
 this instrument was executed in direct contravention of the Act.

The next objection is, that no ejectment can be brought for the  
 lands, because the jurisdiction of this Court is ousted. To sustain  
 that objection, either there must be an express exclusion of the  
 jurisdiction, or it must be excluded by necessary implication.  
 If by necessary implication, we must be satisfied that the sub-  
 stituted jurisdiction is adequate; otherwise the implication cannot  
 arise. It is on the 143rd section of 3 & 4 Vic. c. 108, this  
 question rests: it enacts that purchases, sales and demises of  
 corporate property, since August 1836, may be called in question  
 by the council of the Corporation; and if such appear to have been  
 collusively made, that collusion is to be submitted to a jury. Here  
 the lease was for a valuable consideration; but it is made in contra-  
 vention of the terms of the Act, and the right is not cognizable by  
 this tribunal; therefore no implication can arise. Then follows the  
 145th section. It cannot be denied that there is some obscurity  
 in that section; but there is no ground for saying that this special

tribunal could administer relief, much less that this Court have not power to interfere. The exceptions therefore must be overruled.

Judgment for the plaintiff.

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*Queen's Bench.*  
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BELFAST AND BALLYMENA RAILWAY COMPANY

v.

D. R. ROSS, M.P.

M. T. 1847.

*Nov. 4.*

In this case an action had been brought against the defendant, for calls on shares held by him in the Belfast and Ballymena Railway Company. The defendant being a Member of Parliament, the proceedings were commenced by original bill and summons; and no appearance having been entered, a *distringas* was issued and filed on the 3rd of May, on which the Sheriff made the usual return; an *alias et pluries distringas* then issued, and the Sheriff returned that he had levied full issues.

Where in default of appearance to an action brought against a person having privilege of Parliament, full issues are returned by the Sheriff, the proper practice is to have the issues returned into this Court.

*John Gilmore* now moved that the proper officer of this Court should estreat those issues into the Court of Exchequer.—[PERRIN, J. The Court of Exchequer have no cognizance of this action; the ancient practice was, to direct the officer to return the issues into this Court.]—In 1 *Ferg. Prac.*, p. 750, the practice is otherwise stated, and has been acted on in the case of *Smith v. Lord Langford (a)*. In England doubtless the practice is, to return the issues into the Court whence the *distringas* proceeds; but that is by Act of Parliament, 10 G. 3, c. 50, s. 3, to which there is no analogous statute in this country. The issues being a forfeiture to the Crown, the Exchequer is the proper Court to have the disposal of them: *Com. Dig. Process, D; Dalton, Sheriff*, p. 58.—[CRAMPTON, J. The uniform practice of this Court was not to

(a) Cr. & Dix, N. C. 382.

M. T. 1847. *Queen's Bench.* estreat issues into the Exchequer: that certainly was deviated from in *Smith v. Lord Langford*, but the propriety of so doing was never discussed.]

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AND  
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RAILWAY  
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v.  
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BLACKBURN, C. J.

The previous practice was the correct one; we will therefore grant you an order that the Sheriff do return the issues into this Court.

Let the High Sheriff of the county of Down bring in the issues returned by him to the writ of *pluries distringas* in this cause, within eight days after service of this order.\*

\* RANSFORD

v.

GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.

May 23. BUTT, on behalf of the plaintiff, applied that the several issues in this case may be estreated into the Court of Exchequer.

BLACKBURN, C. J.

We had occasion to consider the matter in the early part of the Term, and concluded that the old practice of the Court should be followed, and that the issues be returned into this Court.

CRAMPTON, J.

That is, without denying that they may be returned into the Exchequer.

*Butt.* Then we must get the costs of compelling the Company to appear.

*Fitzgibbon*, contra.

BLACKBURN, C. J.

The Company have induced these costs, and have caused the plaintiff to be delayed in his proceedings; the Sheriff may, out of the issues, pay the costs.

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*Queen's Bench.*

DUKE OF LEINSTER v. METCALF.

Nov. 5.

**DEBT**, on an indenture of lease by the lessor against the assignee of the lessee. The declaration contained one count, averring that the plaintiff being seised in fee, on the 13th day of May 1833, granted by lease and release the *locus in quo* to Caleb Eyre Powell, *habendum* for one life or thirteen years, whichever should longest continue, at the rent of £119 per annum; that Caleb Eyre Powell assigned his interest to the defendant, and that the defendant held the premises up to May 1846. That the life dropped on the 1st of January 1840, and that on the 25th of March 1846 one year's rent became due. Breach—Non-payment of the rent.

The defendant having cravedoyer of the lease, it appeared that it contained a non-alienation clause; and thereupon defendant pleaded, first, *nil debet*; secondly, *actionem non*, because he says that the said indenture of re-lease above stated to bear date the 14th day of May 1833, contained a proviso in the words following, that is to say: "Provided always, and these presents are granted upon the express condition, that if the said Caleb Eyre Powell, his heirs, executors or administrators, or his or their assigns (if he or they should be permitted to assign), or any of them, shall assign, alien, sell, mortgage, or dispose of his or their interest or term in the hereby demised premises, or any part thereof, or let or demise the same, or any part or parcel thereof, to any person or persons whatsoever, without the consent of the said Duke of Leinster, his heirs or assigns, first thereunto had, under hand and seal (except by his last will and testament, or by deed or will to his wife or child, who shall actually reside on the said lands and premises, and shall not set or demise the same or any part thereof), that then and from thenceforth this present demise shall be utterly void."—*Profert*.

The plea then alleged, that after the making of said indenture, and after the 24th of March 1832, and before the expiration of the

An indenture of lease contained a clause against alienation, unless with the consent, under hand and seal, of the landlord, and that the indenture should be void without such consent. To a declaration for non-payment of rent founded on such indenture, the defendant pleaded that the lessee had assigned to him, without the required consent being given by the landlord. *Held*, that the plea was bad, as it did not allege the non-existence of a consent in all the modes specified in the Subletting Act, 2 W. 4, c. 17; and that it should have negatived every species of license which could validate the lease.

*Semble*.—That the Subletting Statutes were passed to effectuate the Common Law right of landlords, and to relieve them from a waiver by implication.

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term, and before the rent became due, to wit, on, &c., Caleb Eyre Powell, by indenture dated, &c., conveyed his interest to the defendant; that this deed was lost by accident; that the consent of the plaintiff, under hand and seal, to this assignment was not had; and that the defendant was not the wife or child of the lessee.—

*Verification.*

Replication to this plea, that the plaintiff, on the 1st of January 1845, by writing under his hand, did expressly waive the condition in said proviso contained.—*Profert.*

Special demurrer to this replication, that it was not averred that the waiver took place before the commencement of the action, or that the writing in said replication mentioned was under hand and seal.

Joinder in demurrer.

*Richard Armstrong*, in support of the demurrer.

This action is not maintainable, there being no privity of estate. The plea shows that the assignment was a nullity, and we contend that the estate is gone. The 7 G. 4, c. 29, enacted, that when lands were held under any lease or agreement in writing, made before 1st of January 1836, with a clause against sub-letting, no future act of the landlord should be deemed a waiver of that clause, unless he were a party to the instrument of assignment, or had given his consent in writing. The sub-lease is wholly inoperative: *Troy v. Kirk* (a). That statute was repealed, but some of its provisions were re-enacted by 2 W. 4, c. 17.\* and any alienation of leases made since 1st of

(a) 11. & N. 326.

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\* 2 W. 4, c. 17, s. 2, enacts: "That where lands or tenements in Ireland are, or shall be, holden by virtue of any lease, instrument, or agreement in writing, which lease, agreement or instrument doth or shall contain any condition, clause or covenant prohibiting, controlling, or regulating the assignment or subletting of the lands or tenements demised or agreed to be demised thereby, or of any part thereof, no act, matter or thing whatever hereafter to be done or acquiesced in by the lessor or lessors, person or persons contracting to lease by such deed, instrument or agreement, or by his or their heirs, executors, administrators or assigns, shall be deemed, taken or construed in any Court of Law or Equity to be or amount to a waiver of the benefit of any such condition, clause or covenant; and

May 1832, which leases do not contain any clause against sub-letting, is as valid as before that statute. The privity being gone by the assignment, no action is maintainable on the lease; and it is not competent for the plaintiff to say, I waive the condition and its benefit, and thereby set up the privity which was put an end to by the statute. He may waive the condition, and bring an action for use and occupation. The privity of contract is gone by the assignment: *Marrow v. Turpin (a)*.—[PERRIN, J. How could the plaintiff maintain use and occupation, there being an outstanding lease?—It is immaterial whether the lease be in existence or not, for the question is as to the privity of estate. The assignment did not confer any privity of estate. It was competent for the plaintiff to say the lease is at an end, because the condition was broken; and then he might have brought his action for use and occupation. The lease may be in existence, and yet the assignment to the defendant be a perfect nullity; unless the estate be set up by this writing under the hand of the plaintiff the action is not maintainable.—[BLACKBURN, C. J.

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(a) Cro. Eliz. 715.

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that in any action or actions for the breach of any such condition, clause or covenant, the benefit of which condition, clause or covenant has not been heretofore waived, such lessor or lessors, contracting party or parties, and his and their heirs, executors, administrators and assigns, shall be entitled to recover the possession of such lands or tenements, by virtue of any such condition or any penalty for such future breach of any such condition, clause or covenant, according to the provisions of the same respectively; unless it shall be expressly proved that such assignment or sub-letting was made with the consent of such lessor or lessors, contracting party or parties, his or their heirs, executors, administrators or assigns, testified when such assignment or sub-letting shall be by deed or written instrument, by his or their being a party to and signing and sealing such deed or written instrument, or some other deed or written instrument containing such consent, or, where such assignment or sub-letting shall not be by deed or written instrument, testified by his or their consent in writing, or unless the benefit of such condition, clause, or consent, shall have been expressly waived by some writing signed by the party or parties entitled to the benefit thereof; and every such assignment or sub-letting, and every lease, deed or instrument, or other agreement or proceeding, whereby such assignment or sub-letting shall be made without such consent as aforesaid, and testified as aforesaid, shall be and be deemed wholly null and void to all intents and purposes whatsoever, any law, statute, or usage to the contrary notwithstanding."

M. T. 1847. *Doe d. Bryan v. Bancks (a)*, and *Rede v. Farr (b)*, are quite  
*Queen's Bench.* against you.]

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*Hans Hamilton and Napier, contra.*

From all that appears on the pleadings, the assignment may have been before the Subletting Act; the plea negatives the proviso in the lease, but it does not negative the modes prescribed by the statute for testifying the landlord's assent to the alienation. It should have negatived the condition in the statute, for we show by our declaration that the waiver was subsequent to the bringing of the action.

A party cannot be allowed to say a lease has become invalid by his own act; and there is nothing here to show whether it was void at Common Law, or by statute; and if at Common Law, the plea is bad, because the breach of the condition does not render the lease void, it only makes it voidable: *Arnsby v. Woodward (c)*; in that case there was a proviso that it should be lawful for the landlord to re-enter in certain events, and it was held that he had the right to enter or not at his election. *Troy v. Kirk* was decided on the old Subletting Act, and was between mesne landlord and subtenant; but it did not decide that a head landlord validating his lease rendered an assignment void. The Subletting Act did not enable every one in the community to avoid the act of the landlord.

*Armstrong* replied.

BLACKBURNE, C. J.

This is an action of debt, on an indenture brought by lessor against assignee of lessee. The declaration states a perfect cause of action. The defendant craved oyer of the indenture, which contained a clause against alienation, unless with consent in writing of the landlord, and that the indenture should be void if assigned without such consent, and that thereupon the landlord might re-enter.

(a) 4 B. & Al. 407.

(b) 6 M. & Sel. 126.

(c) 6 B. & C. 519.

In order to show that the lease had no longer any legal operation, and that therefore there was no privity, the defendant alleged in his plea that the lessee had assigned to him without the required consent being given by the landlord. This plea is to be considered with reference both to the Common Law and the statute, 2 *W.* 4, c. 17. The lease was for one life or a term of years, whichever should longest continue. At Common Law that was a freehold so long as the life endured, and on the dropping of the life it became a chattel interest. Although the clause in the lease makes it void on alienation without consent, yet so long as it continued a freehold it was only voidable, and could not be avoided but by entry; when it became a term it is plain that upon alienation it was void, but void only at the election of the landlord; the tenant could not, by breaking his covenant, avoid his estate, and thereby get rid of his contract. So far as regards the rule of the Common Law, this plea states no valid ground of defence.

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But it is said, that by the 2nd section of 2 *W.* 4, c. 17 (the Subletting Act), the lease is null and void as against the landlord. There are two answers to this objection. First, a mere formal one; the plea alleges that no consent was given in the manner prescribed by the lease, that is a consent under seal; but it does not, as it ought to do, allege the non-existence of a consent in all the modes specified by the statute; if it were meant to rely on the statute, the pleader should have negatived every species of license which could validate the lease; in this respect therefore the plea is bad.

But secondly, it is bad in substance in reference to the statute. This statute must be taken in connexion with the previous statute 7 *G.* 4, c. 29. The intention of both statutes was to relieve landlords from a waiver by implication, and the presumption of a license. It is therefore provided that the landlord should be at liberty to recover possession, unless he had waived his right in some of the modes pointed out, or licensed the sub-letting or alienation. These statutes were not made to deprive the landlord of his Common Law right, on the contrary their object was to effectuate it. For these reasons I think the plaintiff is entitled to recover, and that these statutes afford no colour for the defence set up.

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BURTON, J.

I concur in the opinion of my LORD CHIEF JUSTICE, and for the same reasons; the statute was passed to protect landlords from such conduct on the part of lessees as is here attempted to be justified.

CRAMPTON, J.

I concur in the judgment of the Court. The plea is bad on general demurrer. The defence relied on by it is this:—There was such a lease, and such an assignment as that stated in the declaration; but that assignment is a nullity, inasmuch as it is void by the provisions of the Sub-letting Act. But it is answered, and successfully answered, that there are exceptions to the generality of the enactment, and the assignment in this case may come within those exceptions. The plea, as it should do, purports to negative all these exceptions as they are stated in the 2nd section of the statute (2 W. 4, c. 19). It is admitted if any of these exceptions be not negatived the plea is bad, and yet there is one excepted case not noticed in the plea.

There are two species of acts of the landlord which seem to be contemplated by this section; first, acts cotemporaneous with the assignment itself; in such case the landlord must be a party to the assignment or execute it; secondly, when the benefit of such condition, clause or covenant shall have been expressly waived by some writing signed by him. This is a different case from the consents referred to in the former part of the section; it is an express waiver of the benefit of the condition, clause or covenant, and would be equally good if done subsequent to the execution of the assignment as before it. At Common Law, any single waiver by the landlord took away his right to the condition, but that is expressly removed by the 3rd section, which enacts, that if a waiver be proved to have taken place in any one particular instance, such actual waiver shall not be assumed or construed to extend to any instance other than that to which such waiver shall especially relate; thus placing the landlord in such a position that he may elect whether he will or not take advantage of any such future waiver. It is therefore plain, independent of the general objection, that this plea is defec-

tive in not alleging that the landlord had expressly by some writing waived the condition.

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PERRIN, J.

The plea is bad. The defendant shows a conveyance to himself, and he says that is avoided and therefore he is not to pay any rent. The statute does not absolutely avoid the assignment, but it provides that no future act of the landlord shall be deemed a waiver unless he be a party to the instrument of sub-letting or give an express consent in writing. The plea merely shows that the lease was voidable; it does not even appear when the assignment took place, most probably it was during the existence of the freehold lease, and that could therefore only have been avoided by entry.

I therefore think, without adverting to the replication, that the plea is bad, and judgment should be for the plaintiff.

Judgment for plaintiff.

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*Esch. Cham.*

**Exchequer Chamber.**

**Executors KEMMIS in Error v. MACKLIN.**

*(In Error from the Court of Common Pleas.)*

*April 29.*

To a declaration of debt on a bond, bearing date in 1806, the defendant pleaded the usual plea of *solvit post diem*; and at the trial, the plaintiff having failed to give evidence that any suit had been commenced or prosecuted for the recovery of the said debt, or any payment of principal or interest, or other satisfaction made on account of said bond, within twenty years before the commencement of the suit, *Held*, that the Judge ought not to have left the question of payment to the jury, but to have directed a verdict for the defendant. (*Dissentientibus* CRAMP-  
TON, J., and PENNEFA-  
THEE, B.)

THIS was an action of debt on a bond for £2000, bearing date the 29th of September 1806, payable on the 25th of the following March. The declaration was in the common form, and the defendant pleaded *solvit post diem*, to which the defendant replied, taking issue on it. At the trial, before the Chief Justice of the Common Pleas, the plaintiff proved the execution of the bond, and payments on foot of it to the amount of £1800 down to the 21st of October 1812; also a reference to arbitration in the year 1824, on which occasion the defendant said he never would pay any interest, but that he would pay £200 on getting up his bond. The plaintiff then having proved a recent offer on the part of the defendant to compromise, closed his case. Counsel for the defendant then called upon the Chief Justice to direct the jury to find a verdict for the defendant on the following grounds:—First, that the plaintiffs were barred from recovery by the provisions of the 8 G. 1, c. 4, inasmuch as more than twenty years had elapsed between the last payment on foot of such bond and the passing of the 3 & 4 W. 4, c. 27, and 3 & 4 Vic. c. 105; and that no suit had been commenced or prosecuted, nor any interest paid, or other satisfaction made, within twenty years next before the passing of either of the said statutes; secondly, that more than twenty years had elapsed between the date and execution of the bond and the 1st day of January 1833; thirdly, that the right to recover the money secured by the bond was barred by the 8 G. 1, c. 4, previous to the passing of the 3 & 4 W. 4, c. 27, and 3 & 4 Vic. c. 105, and 7 & 8 Vic. c. 90; and that the 8 G. 1, c. 4, was then in force, so far as related to the bond, and the money thereby secured;

fourthly, that the 3 & 4 *W.* 4, c. 27, applied solely to charges on real property, and could not apply to the proceedings in this case, which must be governed by the 3 & 4 *Vic.* c. 105, with the enactments and provisions of which the plaintiffs did not comply, by showing a payment or acknowledgment in writing within twenty years before the commencement of this suit. The Chief Justice, however, refused so to direct the jury, but left it to them to say whether the money due on foot of the bond had been paid or not, or whether there was any thing in said evidence, and from the length of time that had elapsed from the period of the award to the bringing of the action, which would lead them to presume that it had been paid by the defendant, and to find accordingly. The jury found a verdict for the plaintiff, with £200 damages; and a bill of exceptions having been taken to the charge of the Chief Justice on the foregoing ground, the same was argued before the Court of Common Pleas, who gave judgment in Trinity Term 1846; allowing the exceptions.\* The plaintiffs sued out a writ of error, on which the case now came on for argument before this Court. A general judgment for the defendants having been entered up in the Court below (and not a *venire de novo*), which was admitted to be an erroneous judgment (vide *Lord Trimleston v. Kemmis* (a)), there was a preliminary discussion as to the proper course to be taken by this Court under such circumstances, as no writ of error could have lain at this stage of the proceedings if the proper judgment had been entered up. But the Court decided to have the principal question argued, to ascertain whether, in the reversal of the judgment, a *venire de novo* was to issue, or whether judgment was to be entered up for the plaintiffs. The former judgment would be virtually one affirming the judgment of the Court below, the latter a reversal of it.

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*Francis Fitzgerald and Napier*, for the plaintiff in error.

*James Wall and Fitzgibbon*, for the defendant in error.

\* 8 *Ir. Law Rep.* 401.

(a) 5 *Ir. Law Rep.* 394.

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[The arguments were substantially the same as those advanced in the Court below, and will also be found fully adverted to and discussed in the judgments of the learned Judges in this Court].

JACKSON, J.

The action in this case was debt on a bond dated the 29th of September 1806, by the defendant Macklin to Thomas Kemmis, for £4000 Irish, payable on the 25th of March 1807. The plaintiffs declared as executors of Thomas Kemmis deceased. The defendant, after praying oyer of the condition, pleaded *solvit post diem*, and issue was joined thereon. At the trial on the 9th of February 1846, before my Lord Chief Justice of the Common Pleas, the plaintiffs proved the bond, and a memorandum of the 21st of October 1812, showing that £200 was due. It was also proved on the part of the plaintiffs, that in the year 1824 there was a reference to arbitration, and that the defendant Macklin said he would never pay any interest, the delay was Kemmis's; but that he would pay £200 on getting up his bond. The plaintiffs having closed their case, the defendant called for a direction to the jury to find for him on the provisions of the 8 G. 1, c. 4, insisting that the plaintiff's demand was barred thereby before the passing of the 3 & 4 W. 4, c. 27, and the 3 & 4 Vic. c. 106, and that it could not be revived thereby; but the Chief Justice refused so to direct the jury; whereupon Counsel for the plaintiffs excepted. The Judge left the case to the jury on the issue of payment in fact, on the evidence of acknowledgment and offer of payment of £200, on the one hand, and the presumption arising from the length of time on the other. The jury found a verdict for the plaintiffs, £200 damages and sixpence costs. It is right to say, I apprehend the Chief Justice, in thus leaving this case to the jury, did not mean to declare it as his opinion that the law was in favour of the plaintiff's right to recover on such grounds, but took that course in order to put the important question involved into the best course of final decision, at the least expense to the parties. The Court of Common Pleas, after argument, allowed the exception; and the defendant, instead of making up the judgment awarding a *venire de novo*, entered it as a final

judgment for the defendant. In that respect the judgment is plainly erroneous, and must be reversed. This Court had considerable difficulty in dealing with this record as it stands; but at the pressing instance of both parties, it permitted the case to be argued on the merits, to see whether a *venire de novo* ought to be awarded, or whether the plaintiffs below ought to have had judgment.

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It must be now taken, since the 7 & 8 Vic. c. 90, s. 39, that the effect of the 3 & 4 W. 4, c. 27, and 3 & 4 Vic. c. 105, was to repeal the Act of the 8 G. 1, c. 4, and that as regards bonds, the 8 G. 1 has been repealed since the 1st of November 1840, when the 3 & 4 Vic. c. 105 came into operation. The question for the Court then is, what was the effect of that repeal? Is the 8 G. 1, c. 4, as it were obliterated from the statute book, as though it never had been passed, or has it had any and what effect upon the bond in question, and upon this action? It is true, Statutes of Limitation generally only bar the remedy, and not the right. In my opinion, the 8 G. 1 was more than a mere Statute of Limitations in this respect—it barred both remedy and right on this bond, and I think (to use the language to be found in a modern Act, 9 G. 4, c. 35, in reference to the 8 G. 1), it barred and extinguished this debt. Look to the 8 G. 1; observe its title; “for more effectually quieting and securing possessions, and preventing vexatious suits at-law;” observe also the recital; “that it may reasonably be presumed that “debts due by the space of twenty years or more, which have not “been demanded, nor any suit prosecuted for the recovery thereof, “or any interest or other sum of money paid or received on account “thereof, *are paid and satisfied, though no legal discharge can be “produced, or proof made of the payment thereof.*” I conceive the effect of this preamble is not confined to section 1; it is a key to the mind and intent of the Legislature as to these stale demands respecting which they were legislating. The 1st section then gives two years from the 25th of December 1721 to sue upon debts circumstanced as described in the preamble, or in default thereof such debts *shall be presumed to be satisfied and paid*; and enacts, that if after the 25th of December 1723, any action or suit be brought, the party sued shall and may plead payment, and such

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*plea shall be received and allowed as an absolute bar thereof, as if the money had been paid at the day and place first limited for payment thereof, unless the plaintiff shall prove that some action or suit hath been prosecuted for recovery of said debt, or some interest or money paid, or other satisfaction made on account thereof, within twenty years before action brought. The 2nd section enacts, that if after the 25th of December 1725, any action be brought for any debt by bond, &c., due twenty years or more before action brought, where no action hath been prosecuted, or any interest paid, or other satisfaction made within twenty years, the defendant shall be at liberty to plead payment, and such plea shall be received and allowed as an effectual bar.*

Now, I conceive the plain and reasonable construction and effect of that Act was to exonerate the person, purse and property of the debtor from the effect of any debt circumstanced as therein, and *that* without reference to any pleading or proceeding on the judgment, or to any contingency; and this appears to have been very much the opinion of Brady, C. B., in the case of *Morrigh v. Power* (5 Ir. Law Rep. p. 499), to which I shall presently refer more particularly. I think it gave the debtor in this case, while the Act was in full force, and unrepealed, a right to consider this bond, after twenty years had elapsed from the last payment, viz., on the 21st of October 1832, as paid and satisfied, barred and extinguished, no action having been commenced or prosecuted, or any satisfaction made on account thereof within twenty years. I think the plaintiff had a perfect right to destroy his vouchers, or, at least, to disregard them, and to avail himself of that right, and of the statutable presumption of payment, if ever sued upon it after the expiration of twenty years.

Now, the repeal of the 8 G. 1 could not, in my opinion, take away from the debtor the complete vested right to defend himself on the statutable presumption of payment, nor could it have the effect of setting up or giving validity to a bond, which, by the lapse of twenty years, without any payment or satisfaction being made on account thereof, or any proceeding taken for the recovery thereof, was extinguished or barred. The 9 G. 4, c. 35, s. 7 (the Redock-

eting Act), is a Legislative declaration to that effect as regards judgments.—[His Lordship here read the 7th section of the Re-docketing Act.]—Now, it would be absurd to hold a different rule as to bonds similarly circumstanced with the judgments mentioned in that section. Judgments and bonds are in the same clause, and subject to all the enactments in the 8 G. 1, c. 4. Such certainly was the opinion of the present Lord Chancellor Brady, when he was the Chief Baron of the Court of Exchequer, in the case of *Morrogh v. Power*. The Court held the judgment in that case to be *barred* and *extinguished*; and further, that with regard to all judgments which, at the time of the passing the 3 & 4 W. 4, c. 27, were barred and extinguished by the 8 G. 1, c. 4, the effect of the 3 & 4 W. 4, c. 27, was not to revive or set them up again; that the suits contemplated by the 3 & 4 W. 4, c. 27, were suits for valid and subsisting demands not otherwise barred and extinguished at the time that Act passed; in other words, demands for which at that time the judgment was a valid and subsisting security. And Brady, C. B., used these striking words:—"If the 3 & 4 W. 4 is "to have the effect of keeping alive this judgment, it must be con-  
"tended, that in addition to its being (as it professes to be) an Act  
"for the limitation of actions and suits, it must have the further  
"operation of being, in this case, an Act for the revival of a stale  
"and barred demand."

Now, the 32nd section of 3 & 4 Vic. c. 105, was also passed for the limitation of actions and suits, and enacts, that the action of debt on bond shall be commenced and sued within the time of limitation thereafter expressed, viz., ten years from the end of the then Session of Parliament, or twenty years after the cause of action or suit, and not after. Surely, the reasoning in the judgment of the Court of Exchequer is as applicable to this bond as to the judgment in *Morrogh v. Power*; and I may apply the words of Brady, C. B., regarding the 3 & 4 W. 4, equally to the 3 & 4 Vic. And in giving judgment in the case of *Cloncurry v. Piers* (9 Ir. Law Rep. p. 411), Sir Edward Sugden is reported to have said, that "the framers of the Act (3 & 4 W. 4, c. 27,) were not aware of the existence of the 8 G. 1, c. 4, and there is nothing in the statute of W. 4 to compel

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*Each. Opin.* "no longer a subsisting security." So that in his opinion also, the  
 effect of the 8 G. 1 was to bar and extinguish the debt, and the  
 security no longer existed.

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It has, however, been contended by Mr. Napier, that the 8 G. 1 could not have had the effect of extinguishing the debt, and he applied the test which appeared to produce an effect on some of my Brethren for whose opinion I entertain the highest and most sincere respect: suppose an action of debt brought on this bond, and a plea of *non est factum* only, the plaintiff in such a case must have judgment on the bond, and therefore the debt is not extinguished. I do not deny that in such a case the plaintiff would, and ought to, recover a verdict and judgment; but that is because, upon the defendant's own showing, it is not a case within the statute 8 G. 1 at all. That statute applies to the *genuine bond of the party*, on which the obligee has lain by for twenty years. It does not make such a bond void as a forgery, but it has rendered it a satisfied bond; and the defendant, to have the benefit of the statute, should treat the bond accordingly, and plead payment. By pleading *non est factum*, he has repudiated the statute of 8 G. 1, for he says that he never executed such a bond at all; and if so, there would be no laches on the part of the obligee. This leads to another important question as to the pleading.

I admit that this cannot be a plea given by the 8 G. 1, or pleaded by virtue of that Act. I admit, that after the repeal of the 8 G. 1, a party could not put in a plea by virtue of that repealed Act. For that purpose, I admit that the repeal has, as it were, blotted out the Act as if it never had existed, with respect to actions brought, and pleas pleaded, after its repeal; and for that purpose, and to that extent, but no further, I admit the applicability and effect of the cases cited by Mr. Fitzgerald—I mean the cases of *Key v. Goodwin* (4 M. & P. p. 341), and *Stevenson v. Oliver* (8 M. & W. p. 241). It must be taken to be a plea under the 6 Anne, c. 10, s. 12, which gives the plea of *solvit post diem*. Under that plea, the defendant may not only give evidence of payments in fact, but may also rely upon length of time, or any ground of presumption at Common Law; and as I

conceive likewise, on the defence or ground of the statutable satisfaction or payment given him by the 8 G. 1, while that statute was in full force. I am aware that it has been objected, that the plea given by the 8 G. 1 being taken away by the repeal of that Act, it is at least doubtful whether the defendant should not have put in a special plea, showing, that before the passing of the 3 & 4 W. 4, c. 27, and the 3 & 4 Vic. c. 105, the debt was barred by virtue of the 8 G. 1; but I think that if the effect of the 8 G. 1 was, as I consider it to have been, to bar the debt *as if paid and satisfied*, that defence may properly be relied upon under the plea of *solvit post diem*, as I have said.

I now come to the argument addressed to us by Mr. *Fitzgerald*, and the authorities cited by him, which I confess carried me with him at the time, and until I had an opportunity of considering the cases. He insisted, upon authority, that the 8 G. 1 having been repealed by the 3 & 4 Vic. c. 105, s. 32, as regards bonds, the case was to be considered now as if such a statute never had been passed. He cited *Key v. Goodwin* and *Stevenson v. Oliver*. I do not however think that those cases establish the position for which he contends. The language used by Judges ought not to be taken as laying down abstrast propositions, but must be understood with reference to the subject in hand. What was the case of *Key v. Goodwin*? An action was brought by the assignee of a bankrupt in 1830: the commission had issued in 1822, when a deposition proving the act of bankruptcy was made, but the defendant died shortly after, and no proceedings were had under the commission until 1827. The deposition was not enrolled until 1828, when it was enrolled pursuant to the 5 G. 2, c. 30, and also under the 95th section of the 6 G. 4, c. 16. The question was, whether that deposition could be received in evidence? It was held not admissible, because the 5 G. 2 had been repealed by the 6 G. 4, and because the 95th section of the 6 G. 4, which makes the depositions conclusive evidence of the matters therein contained, is prospective, and applies only to commissions issued after the passing of that Act. Therefore, the words of Tindal, C. J. (p. 351), are quite correct, "that the 6 G. 4 must be considered as a law that

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"never existed, except for the purpose of those actions and suits which were commenced, prosecuted, and concluded whilst it was an existing law;" because the question was in what actions the evidence could be used; and the evidence being inadmissible by the Common Law, could only be admitted by virtue of a statute in force which authorised its admission at the time it was offered. The other case of *Stevenson v. Oliver*, which is the case of an expired Act, appears to me strongly to show that it would be unjust, and a bad rule of construction, to hold, that rights actually acquired and consummate should be abrogated by the expiration or repeal of an Act creating them. The language of all the Judges in that case appears to me to support this view of it. Lord Abinger says:—"We are of opinion that the replication is good, and there must therefore be judgment for the plaintiff. It is by no means a consequence of an Act of Parliament expiring, that rights acquired under it should likewise expire. Take the case of a penalty imposed by an Act of Parliament; would not a person who had been guilty of the offence upon which the Legislature had imposed the penalty while the Act was in force, be liable to pay it after its expiration? The case of a right acquired under the Act is stronger." Again, Baron Parke says:—"There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction." Baron Alderson observes:—"It seems to me that those persons who, during the years for which the last Act was to continue in force, or previous to that period, had obtained rights under it, had obtained rights which were not to cease by the determination of the Act, any more than where a person commits an offence against an Act of a temporary nature, the party who has disobeyed the Act during its existence as a law is to become punishable on its ceasing to exist." And Baron Rolfe says:—"The only important question in this case is the last. The 6 G. 4, where it says that the Act shall continue in force till the 1st of August next, does not mean

“that which is therein enacted should be of no force after that day ;  
 “if it were so, the Act might be productive of the greatest injustice.  
 “I think that although in one sense this Act is not in force, yet it is  
 “still permanent as to the rights acquired under it,”

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These principles apply to this case; a right had been acquired by the defendant Macklin, under the 8 *G.* 1, while in force, to consider himself and his property discharged from this debt; to have it decreed to have been barred and extinguished thereby, and to avail himself of that discharge and extinguishment if ever thereafter sued for it. He had acquired a right to destroy his vouchers; and it would be great injustice to hold him bound, after a lapse of thirty or forty years, to establish his plea of payment by direct evidence of actual payment, and to vouch it strictly.

After the repeal of the 8 *G.* 1, it is clear that no debt, which was not fully barred while it was in operation, could become extinguished by virtue thereof; but the extinguishment of this debt was complete, and the passage quoted from *Jenkin's Centuries* (p. 233), appears strongly to bear upon this case. It shows the distinction between repeal and the complete nullification of a statute:—"When "one statute is repealed by another, the acts done in the meantime "are valid, but not so when a statute is declared null." But it is said, that this does not apply, because there were no acts done but the mere non-payment of the debt, or non-suing on the record. I think, however, the principle involved in it extends to effects or consequences produced, to things accomplished, and rights vested and consummate; and I consider that inconvenience, confusion, and injustice, would be produced by holding the contrary. Before the passing of the late statutes, many purchases of land were effected upon the faith of the bar created by the 8 *G.* 1; and see how dangerous and unjust it would be, to hold that judgments were now to be revived as charges upon land, by the operation of the 3 & 4 *W.* 4. Again, numerous personal estates have been administered, and are in course of administration, and are to be administered. See how the administration of assets would be disturbed, if it were held that the 3 & 4 *Vic.* revived and set up bonds, which both the debtors and the creditors and all parties concerned were warranted in considering as

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having been barred and extinguished, paid and satisfied, before the passing of that Act. Observe also, the anomalous and absurd consequences which would follow from giving to this Act (3 & 4 Vic. c. 105) the effect contended for by Mr. *Napier* and Mr. *Fitzgerald*. Bearing in mind that it was an Act, the policy and object of which was to bar stale demands, the consequence must be, to set up and give retrospective operation to mere unwritten admissions or acknowledgments, which, under the 8 G. 1, while it remained in force, could have had no effect whatever towards keeping the demand alive; an operation and effect also, which the 3 & 4 Vic. itself denies to such verbal admissions or acknowledgments: in other words, evidence inadmissible by the direct operation of either of these Acts, which is as it were repudiated by them both, would be let in, contrary to the express terms of each of them, and in contravention of the manifest policy which caused their enactment. The consequence is, that in my opinion, the judgment pronounced by the Common Pleas on the defendant's exceptions was right, though we must reverse the judgment appearing on this record, and award a *venire de novo*.

LEFROY, B.

I concur with my Brother Jackson, that the judgment of the Court below ought to be reversed, and that a *venire de novo* should issue; and as my opinion is grounded on the same principles as his, I shall occupy but little time in making a few supplemental observations in confirmation of that opinion. The grounds on which my Brother Jackson has rested his judgment were, that the effect of the statute 8 G. 1 was to extinguish the debt, as if the same had been paid. Now, if it had been paid *de facto*, the plea in this case would have been sustained. Then, have not the Legislature power to make certain specified matters equivalent to payment in point of fact? and if they have done so, and if, while the statute is in existence, it had the effect of making these matters to have had the effect of an actual payment, why is the repeal of that Act to defeat what the statute had done, and which the Legislature said it should do while it existed? Is there any principle of law that decides that

any statute can have a retrospective effect, unless by precise words or necessary implication, whether it be a repealing or a substantive enactment? There is no such rule. Then here, when at some time before the commencement of this action, the statute was in force, which by its provisions declared, that, under the circumstances of the case, this debt was to be deemed to have been paid; what is to prevent the party sought to be charged availing himself of that fact, when the question arises whether it has been paid or not? The statute did not give the plea of payment; but it gave that plea force. The plea was given by a previous Act (6 *Anne*, c. 10, s. 12), and on it the fact of payment might be left to the jury. But the object of the 8 *G.* 1 was to prevent that question being left to the jury, and provided, that on certain matters of fact being established, a presumption of law was raised that there had been an actual payment. Accordingly, it was never in practice required that it should have been shown that all these matters had been ascertained through the medium of an action at law, in order to be assured that a judgment was discharged. It was at once considered as satisfied, and it was not deemed necessary that it should be satisfied on record. But now, it is insisted, that a party can only claim the advantage of the 8 *G.* 1 through the medium of an action; and that too, when one of the stated objects of the Act was the prevention of vexatious suits at law. So that, according to the argument on the part of the plaintiff, to have the benefit of the statute, there must have been a vexatious action at law.

Again, in the first section of the Act it is recited—"Forasmuch as it may be reasonably presumed that debts due for the space of twenty years or more, which have not been demanded, nor any suits prosecuted for recovery thereof, or any interest or other sums of money paid or received on account by the space of twenty years past, are satisfied and paid, though no legal discharge can be produced, or proof made of payment thereof." This extends to all debts, and is not confined to those then existing, and for the recovery of which two years are given from the passing of the Act. Thus, to repeat this legislative declaration, "that the debts may be reasonably presumed to have been paid," and to extend it to the

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 MACKLIN. has declared that under the circumstances stated therein this debt may be presumed to have been paid. Is it to be considered as barred because an action has been brought? No; but because the Legislature has declared that there is a reasonable presumption in law that it has been paid; and that a jury should act on that presumption as the Court acts on it, when the circumstances on which it is founded exist. Moreover we find, in the case of *Maddock v. Bond* (Ir. T. R. p. 332), that the Court lays down the effect of this statute to be, that "a space of twenty years shall extinguish the debt, and give a plea of payment." Not that it shall be extinguished by the plea of payment, but that it is extinguished by the lapse of time, when nothing has been done to keep it alive.

In further confirmation of this view, that this statute was not merely a Statute of Limitations, but was a statute barring rights, I would call attention to the saving in the section, "that nothing therein contained shall be considered *to bar the title or claims* of any person, &c., who shall commence and prosecute an action within the space of five years after the title shall accrue." A Statute of Limitations, generally speaking, only bars the remedy, but here there is a bar of the rights, when none of the exceptions exist. On these grounds, and the others so fully and satisfactorily stated by my Brother Jackson, I concur in opinion with him that a *venire de novo* should issue.

RICHARDS, B.

I am of opinion that the view of this case which has been taken by my Brethren Jackson and Lefroy is correct; and as I concur in the reasons given by them, I do not think it necessary to occupy the public time further than to state, that in my opinion a *venire de novo* ought to issue.

CRAMPTON, J.

This is an action of debt upon a bond, brought by the executors of the late Thomas Kemmis against J. G. Macklin. The bond bears date the 29th of September 1806, and was executed by the defend-

ant to the late Mr. Kemmis for the sum of £2000 late Irish currency. The defendant pleaded payment, *solvit post diem*, and the only issue was therefore whether the bond was paid or not. At the trial, before the Chief Justice of the Common Pleas, the defendant gave evidence of payment on the foot of the bond to the amount of £1800, down to the 21st of October 1812. There was no evidence of any further payments; but there was evidence that in the year 1821 the defendant admitted that £200 was then due upon the bond. The defendant did not offer any evidence, but insisted upon a direction from Doherty, C. J., that the action was barred by virtue of the statute of the 8 G. 1, c. 4. The Chief Justice, however, left the case upon the evidence to the jury, who found a verdict for the plaintiff for £200. The defendant's Counsel excepted to the direction of the Chief Justice. That bill of exceptions was allowed by the Court of Common Pleas, and the defendant entered thereupon a final judgment against the plaintiff. That is clearly an erroneous judgment; for, supposing the exceptions to be well founded, the judgment should have been only for a *venire de novo*. The whole Court is, therefore, agreed that the judgment of the Court below must be reversed. But then arises the question, what judgment ought this Court now to pronounce? The record is before us upon a writ of error. The plaintiff has had a verdict, and he insists that the exceptions should be overruled, and that he should have final judgment; and if the exceptions are not well founded, it is clear that the plaintiff is entitled to final judgment; if they are well founded, there should be a *venire de novo*.

The question then is, was the Chief Justice, who tried the case, bound to tell the jury that the defendant was entitled to a verdict, or to have nonsuited the plaintiff? I think he was not, and that he pursued the proper course in leaving to the jury the question whether the bond declared on was or was not paid. This opinion I hold for two reasons; first, the defence founded upon the repealed statute of the 8 G. 1 was not open to the defendant; if he meant to rely upon that defence he should have specially pleaded it, whereas his only plea was a plea of payment; but secondly, I think that, even supposing the defence relied on by the defendant in argument

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was open to him on the plea of payment, yet that defence is not a bar to the plaintiff's action. This latter question was the main subject of the argument on the bill of exceptions, and therefore I shall say no more on the form of the plea than this, that the plea of *solvis post diem* is no general issue, that it is itself a statutable plea, and opening only the single enquiry of payment, as a question of fact.

But supposing the defence upon the repealed statute to be open upon this plea, then we have to consider the exceptions; and first, I may observe here, that the plaintiff's evidence was received without any objection, and that that evidence forms part of the record now before us; and with the finding of the jury (that £200 remains due on the bond) negatives the possibility of a presumption in fact that the bond debt is paid. It follows that, if a presumption is to be made in favour of the defendant, it must be a presumption of law, and rests altogether upon the lapse of time since the date of the bond, and the effect to be given to the repealed statute of the 8 G. 1.

The argument of the defendant is this: the last payment made on the bond of 1806 was in 1812. The acknowledgment of the defendant in 1824, being a mere parol acknowledgment, goes for nothing. In 1833 the statute of the 8 G. 1 was in force, and in that year the plaintiff's debt, by lapse of time and by force of the statute, was barred, and the subsequent Statutes of Limitation could not revive the debt. I fully admit that if the plaintiff's debt was barred in 1833, the subsequent statutes did not revive it. But the question then recurs, was the plaintiff's debt so barred in 1833? I think not. I admit that if an action had been brought in 1833, and if the defendant had availed himself of the defence furnished by the 8 G. 1, c. 1, the plaintiff would have been defeated. The defendant might, to such an action, have pleaded payment under the statute of the 8 G. 1, c. 4; and by the terms of that statute, such plea should be received and allowed as an effectual bar to the action, as if the money had been paid at the day, &c., *unless* the plaintiff made, on his part, the statutable proof to rebut the legal presumption; otherwise, in the language of the statute, "such debt shall be presumed to be paid." But, by the 7 & 8 Vic. c. 90, s. 39, after reciting the 8 G. 1, and doubts as to its having been repealed by the 3 & 4 W. 4,

and the 3 & 4 Vic. c. 105, it is thus provided:—"Now, for quiet-  
 "ing and putting an end to such doubts, it is hereby declared and  
 "enacted that the said later Acts were and shall be deemed to be a  
 "repeal of the said Act passed in the 8 G. 1." The Act of the  
 3 & 4 Vic. c. 105, is the new Statute of Limitation as to bonds.

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This last Act was passed in the year 1840; and by it we must now admit that the 8 G. 1, as to bonds, was repealed. The 3 & 4 Vic. allowed a period of ten years, from the passing of the Act, for commencing actions upon bonds executed before the passing of the Act. Within that period, viz., in 1846, the present action was commenced; and it is admitted, that there is nothing in that statute to affect the plaintiff's right to recover. How then is the defendant entitled to a verdict? It is plain that the plea of payment pleaded in this case is not, and cannot be, a plea under the statute of the 8 G. 1. It is, and must be, pleaded under the statute of the 6 Anne, c. 10, s. 5. The bond being forfeited, *solvit post diem* was no plea at Common Law. It was given by the statute of Anne; and it enabled the defendant to plead (and to rely on) payment after the day as a defence to an action on the bond. But the issue which it raised was an issue in fact, viz., the fact of payment. That fact might be proved in various ways, directly or circumstantially. The mere lapse of time unexplained (twenty years or less) might furnish a ground for presuming payment, but still it was a presumption of fact for a jury to make upon the evidence laid before them, as appears by the judgment of the Court in *Maddock v. Bond* (Ir. T. Rep. p. 342). But the plea of payment under the 8 G. 1 not only admitted of the presumption of fact from circumstances, but it raised a presumption of law, where the bond was over twenty years old, which effectually barred the action, unless the plaintiff could by the statutable proof rebut that presumption.

But this statutable defence was subject to these two conditions: first, the party must, by pleading, avail himself of the privilege; secondly, the presumption was not a conclusive one—it was open to removal by evidence of a suit commenced, or interest, or money paid, or other satisfaction made on account of the bond. If the defendant pleaded, not payment, but any other plea, as *non est*

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*factum*, for example, and failed, the lapse of more than twenty years appearing on the record raised no presumption in his favour, and judgment must be against him. And secondly, though he did plead payment, and though the bond appeared above twenty years old, yet the plaintiff might show a former suit commenced, or interest paid, within twenty years before the action was brought, and so rebut the statutable presumption. The repeal of the 8 G. 1 appears to me to have left the case as it stood at Common Law after the statute of *Anne*; and if so, Chief Justice Doherty could not have directed the jury to find for the defendant, as he would have done had the 8 G. 1 been in force. If indeed that statute had been in force, the evidence given by the plaintiff could not have been received: that is clear from the case of *Maddock v. Bond*. But there was no statute in existence to allow the rejection of the plaintiff's evidence, or to defeat its effect; and I cannot see on what principle the jury should have been directed to reject it, and to find a verdict against the fact and truth of the case.

It is, however, contended that this debt was barred in 1833. The argument is put in two ways; first, it is said, that though the statute of the 8 G. 1 was repealed in 1840, yet that its operation had been before that year to bar the plaintiff's action; and that the bar had taken place in 1833; that this was a bye-gone transaction, past and closed, and could not be affected by the repeal of the statute. Now, first, I say the debt was not barred in 1833. The plaintiff's remedy, if the defendant chose to avail himself of a statutable privilege, was taken from him, but the debt remained. As in other Statutes of Limitation, the remedy, not the right, was affected by the 8 G. 1; and the repeal of that statute left the parties to their Common Law rights and remedies, subject to the provisions of the superseding statute, viz., 3 & 4 Vic. c. 105. It was the not distinguishing between the debt and the remedy to recover it, which, with great deference to the Court of Exchequer, led to the decision in *Morrogh v. Power*. The Chief Baron's judgment in that case goes upon the notion that it was the debt, not the action, which was in certain cases barred by the statute of 8 G. 1, whereas that statute extinguished no debt, it nullified no security, but it gave a special

defence to the debtor, under special circumstances, of which he might or might not avail himself; and when the word "bar" is used in the statute it is used in reference to the action, not to the debt. It means, not an extinguishment of the debt, but an obstruction to its recovery. It gives a plea in bar as a defence to the debtor. It takes away no right from the creditor, but the right of maintaining his action under the circumstances contemplated by the statute. I think that the case of *Morrogh v. Power* should not rule this case; in other circumstances indeed it differs from the present, but it agrees with it in this, that even supposing the construction of the statute to have been right, the judgment was erroneous.

But secondly, there was nothing in this case done or closed between the parties under the statute of 8 G. 1, which could sustain the character of a bar. The last transaction between them was in the year 1821. That was an arbitration, and an acknowledgment by the defendant that the bond was unpaid. When a statute (says *Dwarris*, 2nd vol., p. 676) is repealed, it must be considered (*except as to transactions past and closed*) as if it had never existed; and the authorities fully bear out the position. Such is the view taken by Tindal, C. J., in *Key v. Goodwin*; and by Parke, B., in *Stevenson v. Oliver*; and the passage cited from *Jenkins's Centuries* is by no means at variance with these authorities. There has been no act done, there has been no transaction completed in this case, to bring it within the exception. The utmost that can be said is, that the debtor had, under the 8 G. 1, a right of defence by way of plea given him, which right has been taken away by the repeal of that Act. No argument, therefore, in support of the defendant's case, can be derived from any thing done or transacted under the statute.

But secondly, it is suggested, that although the defendant can derive no benefit from any thing enacted by the repealed statute, yet that his case may be sustained by its recital, which declares, that it is reasonable to presume that old bonds and judgments, upon which no suits have been commenced or prosecuted within twenty years, or no interest or money paid, or other satisfaction made, are satisfied and paid, though no legal discharge can be shown,

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E. T. 1848. or proof of payment made. But the answer to this argument is  
*Esch. Cham.* obvious. If this recital expresses the reason for which the Com-  
 KEMMIS mon Law is to be varied and the new enactment made, then the  
 v. . repeal of the enactment shows that the Legislature has changed  
 MACKLIN. its mind upon the subject, and the reason and the enactment fall  
 together. But if it be taken to be a declaration of the Common  
 Law (as it may be), let us see what is the extent of its meaning.  
 Is it more than this, that in all cases in which twenty years have  
 passed without demand, payment, or satisfaction, the bond or judg-  
 ment ought to be presumed to have been paid or satisfied? This is  
 what the recital declares to be reasonable; it is what the Common  
 Law before declared to be reasonable; it was the course pursued by  
 the Judges interpreting the Common Law before the statute of the  
 8 G. 1 was passed; see *Oswald v. Lee* (3 T. R.), but especially see  
 what was said by Downes, J., in *Maddock v. Bond* (Ir. T. R. p. 342.)

At Common Law, there existed in proper cases the presumption  
 of fact, from mere lapse of time, that a debt was paid. That is the  
 presumption referred to in the recital of the 8 G. 1. But if the mere  
 lapse of time without demand, &c., raised a presumption of law, the  
 statute would not have been passed.

The Act of the 9 G. 4, c. 35, s. 7, has been relied on as a legis-  
 lative exposition of the effect of the 8 G. 1, and as showing that  
 that effect was, in the cases to which it applied, to extinguish and  
 bar, not the remedy merely, but the debt itself. I cannot but think,  
 however, that the Legislature never intended such an exposition as  
 that contended for. The Act of the 9 G. 4 is an Act to protect  
 purchasers, and it makes null and void judgments not redocketed  
 or revived, under the circumstances, and in the manner prescribed  
 by the Act; and the 7th section does nothing more than guard  
 against the supposition that the redocketing of judgments under its  
 provisions should give to them any validity beyond that which they  
 before had independently of its operation; and we are referred back  
 to the 8 G. 1, to ascertain what the bar and extinguishment effected  
 by that statute is, viz., a bar and extinguishment, not of the debt or  
 security, but of the remedy; and of which the debtor, by a special  
 proceeding, may or may not avail himself at his discretion. The

question always is, what was the law applicable to the case in the year 1846? The Act of the 8 G. 1 had expired in 1840; the provisions of the new statute of the 3 & 4 Vic. were applicable only to securities to be executed after the passing of that Act, and a limitation of ten years was allowed for commencing actions or suits upon pre-existent bonds. After those ten years all such securities are barred; but during that interval, such actions are not controlled by any statute, and the pleadings and proceedings are as they would have been if the statute of the 8 G. 1 had never been passed; and as they were in England, where such a statute never existed.

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Suppose the facts appearing on this bill of exceptions were spread on the face of a special verdict, can it be argued that the defendant would be entitled to judgment? It would appear (the issue being whether the bond declared on was paid or not) that £200 remained still due on the bond. This would be one of the findings of the jury; and according to the defendant's argument, the Court would, notwithstanding, be bound to adjudge that the bond was paid—a conclusion, in my mind, utterly inadmissible. For these reasons, I am of opinion that the exceptions should be overruled, and judgment given for the plaintiff.

TORRENS, J.

I continue of the opinion I entertained of the exception on this record in the Court below, and think it unnecessary to occupy the public time further than by stating, that I concur in the judgment and reasoning of my Brethren Jackson and Lefroy, that a *venire de novo* ought to issue.

PENNEFATHER, C. J.

The question for the decision of this Court is, whether the judgment of the Court below is to be reversed by changing it into a *venire de novo*? or whether judgment is to be entered up for the plaintiff? the Court being unanimously of opinion that the judgment cannot stand, and the only question being as to the form of its alteration. With respect to that question, I own that I have felt considerable difficulty; but after the fullest consideration, it does

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*Exch. Cham.* be overruled, and judgment entered up for the plaintiff. The case  
KEMMIS has been so fully argued, and the facts so clearly stated by my  
v. Brother Jackson, that it is not necessary for me to enter into any  
MACKLIN. detail, or to refer to any of the authorities on the subject. The  
question is simply this, whether, on the facts appearing on the bill  
of exceptions, and the finding of the jury, we are called on to say,  
that at the time of the commencement of this action, the plaintiff's  
right was barred? That must depend on the consideration of the  
statute 8 *G.* 1, which, by the enactments of the 8 & 9 *Vic.*, must be  
considered, as respects bonds, to have been repealed by the 3 & 4  
*Vic.* c. 105. The action was commenced in the year 1846, at a  
time when the 8 *G.* 1 was not in existence. It was an action of  
debt on a bond, to which was pleaded a plea of payment *post diem*,  
which was a plea no longer to be relied on as given by the 8 *G.* 1,  
but by the 6 *Anne*; and I think it is not immaterial to observe on  
the nature and meaning of that plea, and which is to be relied on  
in support of it. The meaning of this plea is, that there has been an  
actual payment of the debt, to be proved by either positive evidence  
of such payment, or by a presumption of it, as a matter of fact,  
to be raised by the jury, from lapse of time, or other circumstances.  
To the conclusion that there has been no payment, the jury in this  
case have come, and upon evidence, the reception of which has not  
been objected to, and which we are therefore bound to consider as  
properly received. But it is said, that notwithstanding that fact,  
and the evidence on which that finding was given appearing on the  
record, nevertheless this bond was not, at the commencement of this  
action, an actual debt; and that question depends upon the construc-  
tion of this statute, 8 *G.* 1, c. 4. Now, it appears to me, that this  
Act deserves a different consideration in its 1st and 2nd sections;  
and I can scarcely consider that we are to take the words of the 1st  
section as imported into the 2nd by reason of the preamble. A pre-  
amble, though it may lead us to the construction of a statute when  
the provisions are ambiguous, yet it can only be used in such cases.  
The statutes of the 3 & 4 *W.* 4, c. 27, and the 3 & 4 *Vic.* c. 105, are  
Statutes of Limitation, by which it was not intended to prolong the

time during which rights might be sued on ; but other modes of limiting, or relying on limitations of rights, other than those given by the 8 *G.* 1, c. 4, are given ; and words having been used which the Legislature deemed to have been inconsistent with the provisions of the 8 *G.* 1, these last have been declared by the 8 & 9 *Vic.* to have been repealed by the former. But, not to enter into any thing as to the meaning of those who introduced these statutes, yet looking at them, I would say, that they were made without due regard to the 8 *G.* 1, and, collecting it from the statutes themselves, I think the framers had not the 8 *G.* 1 in their view at the time of making them ; and that to clear up the doubts that arose, it became necessary to enact, that the 8 *G.* 1 was repealed by these later Acts. I make these observations because, conceiving that these statutes did not intend to give rights where none existed, I do not think they ought to be construed to take away rights not in the contemplation of the Legislature at the time they were passed ; and if they repealed an Act of Parliament which they did not intend to repeal without making provision for the protection of existing rights, but omitted to make such provision, it is not for our judgment to supply the deficiency, and we must only take and act on the legislation as we find it, without looking at the consequences, but only at what the Act clearly imports and effects.

It is said, and there is much weight in the observation, that by giving to this statute (8 *G.* 1, c. 4) the construction contended for on the part of the plaintiff, that a person may have made parol declarations of his liability, which he would not have made if these declarations had been binding during the existence of that statute. There is, as I have said, much weight in this observation ; but if those declarations were true, it is no hardship on a party that he should be bound by them ; if untrue, and made hastily and inconsiderately, that is a matter for observation to the jury to disregard them. If the evidence of this description in this case was improperly received, it ought to have been objected to ; but if not objected to, *cui bono* was it received, if it was not to be submitted to, and acted on by the jury ?

Then what are the words of the 8 *G.* 1 from which it is to be

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inferred that this debt has no longer any existence? I admit that acts done, while the statute is in force cannot be affected by a repeal of it; but it is a different question whether a party lying by on his rights is to be considered as an act done by his debtor. Taking that view of the case, let us now look to the 8 G. 1. The 1st section contains the preamble, which must be taken to affect the entire Act, and shows that the intention of the Legislature throughout was to quiet possession.—[Here his Lordship read the 1st and 2nd sections of the Act.]—Now, it appears to me that the effect, of the respective words of these two sections is very different, and that while the 1st section enacts, that if no proceedings shall be taken for the recovery of debts due upwards of twenty years at the time of the passing of the Act for two years, such debts are to be presumed to be satisfied or paid; the 2nd section contains no such words as that the debt referred to in that section is to be presumed to be satisfied or paid, but only gives the debtor liberty to plead a plea of payment; and if he does not think proper so to do, he remains legally liable for the payment of it. I think then that the preamble of the Act cannot so far be introduced into the 2nd section, as to incorporate in that section the words which I have said are to be found in it alone, and which, in my opinion, the Legislature intended to confine to that section alone. If then the meaning and intent of the Legislature was not that the debt should be considered to have been extinguished under the circumstances mentioned in the 2nd section, but only that the defendant should be at liberty to rely on a plea, which if relied on he would be discharged from the debt, that debt cannot be considered as barred and extinguished, if the plea has not been pleaded; and therefore a repeal of that statute, which takes away the statutable defence which it gave, leaves the defendant in the same position as if the statute had never been passed; and places his plea of payment under the statute of *Ann.* The Legislature may not have had the 8 G. 1 in their view when passing the late statutes, and have thereby omitted what they might otherwise have remedied; but it is not for us to give a false construction to these statutes, because an unforeseen mischief has arisen from the legislation, nor are we at liberty to supply the omission.

I have come to this conclusion with great difficulty, and after much fluctuation of opinion, that the judgment of the Court below ought to be reversed and judgment entered up for the plaintiff.

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PIGOT, C. B.

The question for our consideration in this case is, whether or not there existed in it that which called on the Judge at the trial to direct the jury to find a verdict for the defendant on the issue raised by the plea of payment, as if the bond had been in point of fact paid or satisfied. If satisfaction is to be presumed under the circumstances of the case, then the plea of payment was, in my opinion, the proper plea to be pleaded; and that if the presumption of law was not removed by the evidence which the law required, notwithstanding any other evidence which may have been produced on the part of the plaintiff, the defendant was entitled to a verdict; and then the simple question for us is, whether the 8 *G.* 1, c. 4, is to be considered as having had the effect of putting an end to, and extinguishing, the debt?—and in considering that, we must keep in mind the law as it stood when the Act was passed. At that time a plea of payment was the only mode by which a party could avail himself of a defence of payment in point of fact; and I conceive that a presumption of satisfaction by law must be treated as having the same effect on the rights of the parties as a satisfaction in point of fact, for which that presumption of law was substituted, and is to be taken advantage of in the same way. However, all difficulty is, in my mind, removed by the express terms of the Redocketing Act, 9 *G.* 4, c. 35, which speaks of the 8 *G.* 1 as barring and extinguishing a judgment, and that can be effected in no way except by a presumed satisfaction to be raised by a plea of payment. The question therefore is, whether or not by the operation of the 8 *G.* 1, as construed by the 9 *G.* 4, this debt was put an end to by the lapse of twenty years, without payment on foot of it, or any proceeding taken to recover it? and if it has, I do not see how the plea of payment could be found against the defendant, unless we take it that the repeal of the 8 *G.* 1 altered existing rights. On that question, the rule of law will be found in *Jenkins's Centuries*, p. 233, ca. 6, where the principle is thus laid down:—

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"That if one statute is repealed by another, the acts done in the  
"meantime stand good; but not so if it be declared to be null."

But it has been suggested that this only applied to cases in which something has been actually done; but that, as it appears to me, is too narrow a way of putting the rule, which, in my opinion, amounts to this, that a repealing statute is not to be taken as altering rights acquired under the repealed statute, unless there is express legislation to that effect, or necessary implication. That is the principle which has been recognised in several cases; for instance, in the case of *Gilmour v. Shooter* (2 Mod. 310), which was an action of assumpsit brought on a parol agreement in consideration of marriage, and it was relied on, that by a subsequent statute no action could be brought on such a consideration; but the Court held that the Act had not a retrospective effect to take away an action which the plaintiff had become entitled to maintain before the Act passed. The principle of that case was afterwards applied in the case of *Jacques v. Whitty* (1 H. Bl. 65), in which the question duly arose, whether existing rights can be altered by the repeal of a statute creating them? and that case has been recognised by a late authority on the Gaming Act, *Hitchcock v. Way* (6 Ad. & E. 943), in which Lord Denman observes:—"The law as it existed when the action was commenced must decide the rights of the parties to the suit, unless the Legislature express a clear intention to vary the relation of litigant parties to each other."

Being of opinion therefore, that the 9 G. 4 has declared that, by the 8 G. 1 the debt was barred, and that the 8 G. 1 could bar the debt in no way except by a presumption in law, and finding a defence founded on a certain state of facts which raises that presumption, and brings the case within the protection of the 8 G. 1, and holding that the repeal of statutes does not alter the state of rights acquired under them, in my judgment a verdict ought to have been directed for the defendant, and a *venire de novo* ought to issue.

DOHERTY, C. J., stated that he adhered to the opinion which he held in the Court below, that the exceptions ought to be allowed, and that a *venire de novo* should issue.

BLACKBURN, C. J.

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I am of opinion that the judgment of the Court below should be reversed, and a *venire de novo* should issue. The question depends on the operation of the 3 & 4 *Vic. c. 105, s. 32*, which by the 7 & 8 *Vic. c. 90, s. 39*, was declared to be a repeal of the 8 *G. 1, c. 4*. The plaintiff contends that we are to deal with the case as if the 8 *G. 1, c. 4*, had, and could have had, no operation; that its repeal took away the defence which it gave by plea; and that as this was the only mode of rendering the statutable matter of defence available, the plaintiff's case was to be treated as one in which payment in fact was the only matter in issue. If we were to consider this case as if the 8 *G. 1, c. 4*, were not in force or law, at any time before the 3 & 4 *Vic. c. 105*, that is antecedent to the year 1840, the evidence of the arbitration in 1824 might have been left to the jury as some evidence of an admission of the existence of the debt. But are we to treat the case as if the 8 *G. 1* had never existed—as if it had never any operation? How can it be asserted that it had not operation? See, in 1832, when the twenty years from the last payment had elapsed, what, in fact, was the actual condition of the debtor. It was this, that there was a statutable presumption that the debt had been paid, and a right of defence against it. That right of defence—a right, in the strictest sense, complete and consummate—cannot, I think, be taken, away by any rule which I can discover, respecting the construction of repealing statutes. Acts done, rights actually acquired under the statute repealed, whether the result of acts done, or of acquiescence, or by forbearance, cannot be changed in their nature, or divested by any retrospective effect, save such as is plain and unavoidable. Therefore, though, after the repeal of the 8 *G. 1*, the debtor could not plead his defence in the form which it allowed, still the substance of that defence, and the right to use it, founded on the recital of the Act, and its plain and obvious policy, remained; and the creditor has no right to say, that it was intended to restore a right which was substantially extinguished. That the right was so extinguished, and considered so to have been, is evident from Moore's Act, the words of which are strongly observed on by the Chief Baron in the case of *Morrogh v. Power* (5 *Ir. Law Rep.*)

M. T. 1848.

*Exch. Chanc.*

HEMMIS

v.

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There further appears to me to be an insuperable objection to the effect which is sought to be given to the evidence of an acknowledgment of the debt, in this, that such acknowledgment was of no value, and could not have been supposed or intended to have been of any value at the time when it was made. Both debtor and creditor must be presumed to have known that it had, and could have had, no legal binding effect—that it was, in truth, a matter that could not possibly affect the right of one or the obligation of the other. But, though this is plain, and admits of no question, the retrospective effect which we are called on to attribute to the repealing Act (an Act, it is observable, made to bar stale demands) operates to revive stale demands, by giving to verbal acknowledgments an efficacy which did not belong to them while the Act of the 8 G. 1 was in operation.

I might add, in illustration of this part of the case, if there were to be a repeal of the Statute of Frauds, would it validate parol contracts made while it was in force, and which it required to be in writing—thus altering by retrospect the rights and evidence of the rights of the parties? I am, therefore, of opinion, that the judgment should be reversed and that a *venire de novo* should issue.

Let the judgment be reversed, and a *venire de novo* issue.

T. T. 1847.  
*Queen's Bench.*

ROBERT GRIMSHAW and JAMES THOMSON TENNANT,  
two of the Public Officers of the ULSTER BANKING  
COMPANY.

v.

H. C. BOWDEN.

(*Queen's Bench.*)

June 11.

T. K. LOWRY, on behalf of the plaintiffs, applied for liberty to amend the writ and appearance in this case. There had been a writ issued and an appearance entered thereto by the defendant, and the amendment sought was to strike out the name of James Thomson Tennant, one of the public officers of the Company: *Holmes and another v. Binney (a)*; *Thomson and others v. Birnie (b)*.

It is irregular to sue in the names of two public officers of a Banking Company; but the Court will, even after appearance, amend the writ by striking out the name of one of the public officers.

CRAMPTON, J.\*

The defendant has appeared, and you seek now by the proposed amendment in effect to issue a new writ. I do not recollect that we ever made such an order as you seek, but on the authority of the case in 6 *Scott*, you may take a rule *nisi*.†

(a) 6 *Scott*, 346.

(b) 2 *Ir. Law Rep.* 234.

\* *Solus.*

† The order was made absolute on the ordinary affidavit of service and certificate of no cause.

M. T. 1847.

*Queen's Bench.*

THOMAS JONES, Lessee of LORD ASHTOWN,

v.

JAMES WHITE and RICHARD WHITE.

Nov. 11.

A, by indenture, demised to B certain lands, *habendum* for three lives, at the yearly rent of £187, with the usual clause of distress and re-entry for non-payment of this rent. The lease also contained an agreement by B not to sublet or assign without leave first obtained under the hand and seal of A, and that so long as B should perform the covenants and agreements therein contained, A would be content with the yearly rent of £93. 15s. 2d. payable on the same days as the first reserved rent of £187. *Held*, that the larger rent thereby reserved was not a penal rent, and that ejectment was maintainable for its non-payment.

EJECTMENT for non-payment of rent, tried at Tullamore, at the Summer Assizes of 1847, before CRAMPTON, J. The ejectment was brought as of Easter Term, and the following notice of rent due was endorsed thereon in pursuance of the statute of 9 & 10 Vic. c. 111:—"The lessor of the plaintiff claims £374, being for two years' rent up to the 1st day of May 1847; and if the amount thereof be paid to the lessor of the plaintiff or his attorney, together with the costs, before the 22nd day of May 1847, being the first day of the ensuing Term, further proceedings will be stayed." Defence was taken separately for James White, and a joint defence for James White and Richard White, and thereupon a second declaration was filed against them jointly. An order to consolidate was obtained on the usual terms, and at the trial a lease was given in evidence, dated 1st of October 1826, whereby Lord Ashtown demised to James White part of the lands of Ballynowlast, containing 188A. 5R. 5½P. for three lives, and subject to the yearly rent of £187 sterling, payable half yearly on every 1st day of May and 1st day of November. It contained the usual clause of distress and re-entry for non-payment of this rent, and also this agreement,

"that the said James White shall not set, sell, alien, underlet, sub-

*Held*, that general evidence of the change of possession was sufficient proof of the breach of the clause against subletting, and that it lay on the tenant to rebut that evidence.

*Held also*, that the following was a sufficient notice of the amount of rent claimed, within the meaning of 9 & 10 Vic. c. 111, "The lessor of the plaintiff claims £374, being for two years' rent up to 1st of May 1847, and if the amount thereof be paid to the lessor of the plaintiff or his attorney, together with the costs, before the 22nd of May 1847, being the first day of the ensuing Term, further proceedings will be stayed."

\* PERRIN, J., *absente*.

"divide or assign his interest in the hereby demised premises, or any part thereof, without leave first had and obtained from under the hand and seal of the said Lord Ashtown, his heirs or assigns. And it is further agreed upon by and between the parties to these presents, that so long as and no longer during the continuance of this demise than the said James White, his heirs and assigns (if permitted to assign), shall well and truly perform the covenants and agreements herein contained, the said Lord Ashtown, his heirs and assigns, shall and will be satisfied and content with the yearly rent of £93. 15s. 2d. British currency, instead of the reserved rent, payable on the same days and times as the first reserved rent of £187 is otherwise payable." There was also a covenant for quiet enjoyment.

M. T. 1847.  
*Queen's Bench.*

LORD  
ASHTOWN  
v.  
WHITE.

The plaintiff proved the death of the original lessor, and that he was his heir-at-law; and that James White the lessee had paid him rent; that at the time of making this lease the tenant agreed to build a house on the land, and that this house was built at the expense of the defendant Richard White, the second son of the lessee, and that it was agreed between Richard White and his father that he should hold one moiety of the lands subject to one half the rent, but no consent was ever given by the lessor to this division of the land. After the house was built Richard White resided there, and James White, his father, resided in a house adjoining. The rent was received from the father alone by the landlord's agent. James White died in 1846, leaving James White his eldest son and Richard his brother surviving. In October 1845, the lesser rent due in May 1845 was tendered to, but refused by the plaintiff, and notice was given that the full rent would be demanded, but the lesser rent was subsequently received, and a receipt given to James White.

In October 1846, one year's rent according to the smaller sum reserved in the lease was tendered and refused. Upon that state of facts the present ejectment was brought, claiming two years' rent from May 1846.

The plaintiff having closed his case, Counsel for the defendant called for a nonsuit, on the ground, first, that the endorsement on

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*Queen's Bench.*

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the copy of the ejectment served on the defendant was defective in not specifying the gale days; secondly, that the larger rent reserved by the lease was a penal rent, and that the Ejectment Statutes did not apply to such a case; thirdly, that there was no evidence of any violation of the covenant against subletting. The learned Judge refused to nonsuit; and directed a verdict for the plaintiff, reserving liberty to the defendant to move for a nonsuit; and also, in case the Court should be of opinion that the plaintiff ought not to be nonsuited, and that the plaintiff was not entitled to the larger rent, that he should be at liberty to have the amount of the verdict reduced. The jury found a verdict for £374. An order *nisi* having been obtained to set aside this verdict, and that a nonsuit should be entered, pursuant to the leave so reserved, or a new trial be granted on the ground of misdirection—

*Macdonogh* and *Berwick* showed cause.

As to the rent. This is not a penal rent, it is a rent service: 2 *Furl. L. & T.* 1144; *Hume v. Kent* (a); that case shows that in construing covenants for penal rent the Court looks to the intention of the parties. Here the rent reserved is the larger rent which is contained in the *reddendum*: 5 *Bythe. Con.* 396. It is there said, the distinction adopted is this, that if interest be reserved, with an agreement for a reduction on punctual payment, the condition must be complied with, or the higher rate of interest will become payable as well in equity as at law; but if the lower rate of interest be first reserved, with an agreement that if it be not paid within a given time, larger interest shall become payable, equity regards such a stipulation in the nature of a penalty: *Bonafous v. Rybot* (b).

As to the endorsement: *Davis v. Jackson* (c). In the Civil Bill Acts no form of notice was required prior to bringing an ejectment, but under 9 & 10 *Vic. c. 111*, a form of notice is requisite, and with the terms thereof we have complied.

(a) 1 B. & Bea. 554.

(b) 3 Burr. 1374.

(c) 1 Ir. Cir. C. 184.

Then as to the want of evidence [Counsel was stopped, and]—

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*Queen's Bench.*

*Meara*, with whom was *J. T. Ball*, was called on *contra*.

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There was no evidence of any subletting, but evidence that the father had built a house on the land which the son occupied; but there was nothing to show any tenancy, assignment or subletting.—[BLACKBURNE, C. J. The plaintiff avers that there was an assignment, and issue was joined on that, and it was for you to rebut that case. When there is a question of assignment, the affirmative of that issue is with the landlord, and *prima facie* evidence is sufficient.]—In this case the covenant is particularly worded, and such a covenant ought to be construed with the greatest strictness against the landlord.—[BLACKBURNE, C. J. This is not a case upon the construction of the covenant, but upon the rule of evidence applicable to the case; there was *prima facie* evidence here, and you gave no evidence against that case.]—We say the covenant was not violated: *Lord Westmeath v. Hogg (a)*.

We next say that this is a penal rent, to which the Ejectment Statutes are not applicable; but a rent that could only be enforced in case of a violation of the covenants in the lease. Was that larger rent the rent the tenant contracted to pay?—[CRAMPTON, J. How could you plead to an avowry for that rent? the stipulation is, that if all the covenants be performed, the landlord will take the reduced rent, and your case is that you did not perform the covenants.]—Yes, but it is not open to them to say the covenant was violated, they having refused to take the lesser rent.

As to the endorsement. The words of the statute are mandatory. If several gales of rent be due they should be severally stated.

BLACKBURNE, C. J.

In this case an ejectment was brought for non-payment of rent reserved by lease. Three questions have been raised for the consideration of the Court. First, it was said that the rent claimed was a penal rent, and that the Ejectment Statutes did not apply to a rent

(a) 3 Ir. Law Rep. 27.

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*Queen's Bench.*

LORD  
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of that nature. Assuming that to be so, is this a penal rent within any authority cited? We think that it is not. The rent is reserved payable half-yearly, and for it the lessor has a right to distrain and re-enter; so that it is plain, whether the plaintiff proceeded by action or distress the rent to be recovered is £187, and that if he declared for a moiety of that rent there would be a fatal variance; but then comes a clause for the benefit of the lessee, on condition that he do not violate the covenants in the lease; in case he do not do so, the lessor agrees to accept one moiety of the rent, on its being affirmatively shown that there has been a performance of these covenants in the lease. What then is the substance of the contract? We are bound to say the full sum is the rent, and that an ejectment is maintainable for it.

Then, secondly, it is said that the defendant did not violate his contract by assigning. That is a question upon the evidence, whether he assigned or sublet. What was the evidence of that? A party is allowed to allege generally matters which are not within his knowledge, and which he cannot be expected to prove, and this is one of those cases to which this rule peculiarly applies. Where a tenant sublets, a landlord is allowed to make this general averment, and prove by *prima facie* evidence the change of possession—that is, that the tenant dealt with the land in such a way as to make it manifest he was subletting, and it is for the tenant to rebut that evidence. The covenant in the lease is, that James White shall not set, sell, alien, underlet, or subdivide, or assign his interest in the demised premises, or any part thereof, without leave first had and obtained from under the hand and seal of Lord Ashtown, his heirs and assigns. Now, the evidence is, that in the lifetime of James White a house was built, and a division of the land given to his son; there was therefore evidence to go to the jury, and the Judge was right in telling them they were at liberty to presume that the tenant had sublet.

Then as to the endorsement. It follows the very words of the statute, that in all cases of ejectment for non-payment of rent the amount claimed to be due for rent, and the times at which the same accrued, shall be stated upon the declaration. Nothing more is

required than that information should be given to the tenant of the amount claimed, and when it accrued due; and if we go beyond that, we would not only be legislating, but evading what the Legislature have directed to be done.

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*Queen's Bench.*

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Cause allowed, with costs.\*

\* Lessee MARQUIS OF THOMOND v. GREEN.

M. T. 1848.  
Nov. 25.

EJECTMENT for non-payment of rent, tried before MOORE, J., at the Summer Assizes of 1847 for the county of Kerry.

The case having closed on both sides, and the Judge having charged the jury, Counsel for the defendant called for a nonsuit, on the ground of the insufficiency of the notice endorsed on the declaration in ejectment, in pursuance of 9 & 10 Vic. c. 111. The notice was in the following form:—

“The lessors of the plaintiff claim £174. 4s. 3d., being for one and a-half year’s rent and rentcharge, up to the first day of November 1847, the time at which the same accrued due being as follows, that is to say—£58. 1s. 5d., one half year’s rent and rentcharge, due up to the 1st of November 1846; £116. 2s. 10d., one year’s rent and rentcharge, due up to the 1st of November 1847. And if the amount thereof be paid to the lessors of the plaintiff, or their attorney, together with the costs, before the 15th day of April, being the first day of the ensuing Term, further proceedings will be stayed.”

The learned Judge refused to nonsuit, but saved liberty for the defendant to move for a nonsuit if there should be a verdict against him.

The jury found for the plaintiff.

An order *nisi* having been obtained in pursuance of the leave reserved—

*T. R. Henn* showed cause.

This endorsement is quite sufficient, and satisfies the provisions of the statute; but even if the objection to it were a valid one, the stage of the proceedings when it was taken would influence the Court not to allow a technicality to affect the rights of the parties. The statute 9 & 10 Vic. c. 111, s. 1, enacts, “That in all cases of ejectment for non-payment of rent, the amount claimed to be due for the rent, and the times at which the same accrued, shall be stated upon the declaration or summons in ejectment.” It then prescribes a form, which is to be followed as closely as the nature of the case will admit.—[MOORE, J. The objection made was, that the notice was not correct in the statement of the gale days on which the rent became due, they being March and September, and the notice claiming the rent as due the 1st of November.]—It is not incumbent on the lessors of the plaintiff to set out the precise notice of the Act of Parliament, but as near thereto as possible; and the proviso in the 2nd section shows that the Act is not to be so strictly construed; for that section provides, that if any ejectment for non-payment of rent be in other respects sustainable, a mistake or error in the statement shall not defeat such ejectment. The 10th section also leads to the conclusion that this is but a directory provision; for, in making a similar provision with respect to distress, it enacts that a mistake in the amount of rent

The notice to be endorsed on a declaration in ejectment for non-payment of rent in pursuance of 9 & 10 Vic. c. 111, does not require to be in the precise form prescribed by that statute.

M. T. 1848. demanded shall not make such distress void.—[The Court called on the other side.]

*Queen's Bench.*  
MARQUIS OF  
THOMOND  
v.  
GREEN.

Sir C. O'Loughlin, contra.

The provisions of this section are mandatory: *Lessee Bowen v. Cleary* (a). That being so, and its enactments not being complied with, this irregularity in the endorsement is a ground of nonsuit; the notice not being in accordance with the form prescribed, would be clearly bad under the Civil Bill Acts: *Davis v. Jackson* (b).—[MOORE, J. There may be reason for holding the parties to more strictness when proceeding under those Acts, for the defendant may not have notice; but in ejectment for non-payment of rent, the party affected is the defendant in the action.]—I admit the cases are not exactly analogous, but there is no proper date here, and it must be read as if no date were stated.

BLACKBURN, C. J.

We are of opinion that there is no ground for a nonsuit.

PERRIN, J.

If the statute were to be interpreted with so much exactness as is contended for by the defendant, it would assimilate the notice to a pleading; but the Act was passed to confer a benefit on tenants, and to enable them to ascertain how much money they were called on to pay.

MOORE, J., concurred.

Cause allowed, with costs.\*

(a) 10 Ir. Law Rep. 449.

(b) Ir. Cir. Rep. 384.

\* CRAMPTON, J., was absent.

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*Queen's Bench.*

THE QUEEN *v.* LANAUZE.

Nov. 13, 19, 22.

THIS was an indictment against the traverser, who was a stock-broker, for obtaining money under false pretences, and for converting to his own use a certain amount of stock entrusted to him by Mr. R. C. Browne Clayton for a special purpose. The indictment was framed under the 9 G. 4, c. 55, and contained six counts; the first, second, third and fifth counts charging the traverser with the obtaining money under false pretences, on which charge he was acquitted; and the fourth and sixth counts charging him with selling and converting to his use and benefit a certain amount of Government stock entrusted to him for a special purpose, and on these the traverser was found guilty. The trial was had before the LORD CHIEF JUSTICE and a special jury at the Sittings after Trinity Term 1847; and from the evidence it appeared that Mr. Browne Clayton, being entitled as administrator of his father to a sum of £13,000 standing in the name of his father in the Bank of Ireland, on the 23rd of September 1845, went to the Bank with the traverser and transferred to him £9000, for the purpose of having £5000 invested in £3 per cent. consols, and £4000 in £3 per cent. reduced stock, in pursuance of previous directions given to the traverser for that purpose. He, however, did not invest the sums as directed, but drew out the amount, and paid the dividends as if the stock had been invested. The LORD CHIEF JUSTICE thought there was sufficient evidence of embezzlement to go to the jury.\*

An indictment stated that R. C. entrusted to the traverser, being a broker and agent, for a special purpose, a certain valuable security, to wit, a certain amount of Government stock, to wit, the sum of £9000 in the new £3½ per centum annuities, the said special purpose being as follows—that is to say, that the £3½ per cent. annuities should be exchanged for two portions of two other stocks, to wit, £5000, one part thereof to be exchanged for so much of the £3 per cent. consolidated annuities as should be equivalent to £5000 of the £3½ per cent. annuities, and £4000 to be

exchanged for so much of the £3 per cent. reduced annuities as should be equivalent to £4000 £3½ per cent. annuities, and said stocks to be transferred into the name and to the credit of R. C., without any authority to the traverser to sell, negotiate, transfer, or pledge the said £9000 £3½ per cent. annuities; and that the traverser, in violation of good faith, and contrary to the purpose for which the £9000 were entrusted to him, unlawfully sold and converted the same to his own use.

*Held*, that stock in the £3½ per cent. annuities is not a valuable security within the meaning of 9 G. 4, c. 55, under which this indictment was framed.

*Held also*, that the indictment, averring a total absence of authority to sell, transfer, negotiate, or pledge, was at variance with the special purpose for which it alleged the annuities to have been entrusted to the traverser, and that therefore judgment should be arrested.

\* *Vide* 2 Cox Cr. Law Cas. 247-262.

M. T. 1847. An order *nisi* for a new trial on the ground of misdirection had  
*Queen's Bench.* been obtained by *Butt*, with whom was *Napier*; and against this  
 THE QUEEN order, *Brewster* and *Macdonogh* showed cause; and the case having  
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 LANAUZE. been fully argued on the motion to show cause, the Court declined  
 giving judgment till a motion to arrest the judgment, which was  
 then pending, had been disposed of.

The motion to arrest the judgment was grounded on the following objections: first, that the Government stock mentioned in the fourth and sixth counts of the indictment was not a valuable security within the meaning of the Act of Parliament (9 G. 4, c. 55), or section of the Act on which it had been framed; secondly, that the indictment did not negative the exceptions contained in the 43rd section of the statute; thirdly, that the special purpose was not set forth with certainty sufficient to warrant any judgment being passed on the verdict of guilty had on these counts; fourthly, that the special purpose stated on these counts involved of necessity a power to the traverser to sell, negotiate or transfer the stock, and that therefore the charge as laid did not amount to an offence.

The fourth count was as follows:—"And the jurors aforesaid, upon their oath aforesaid, do further present that, on the 23rd of September 1845, to wit, in the parish of St. Michan, to wit, at Dublin, in the county of the city of Dublin, Richard Browne Clayton, as administrator with the last will and testament and codicil of Robert Browne Clayton deceased annexed, of all and singular the goods, rights, credits and chattels which were of the said Robert Browne Clayton, deceased, at the time of his death, did entrust to Henry Lanauze for a special purpose as hereinafter mentioned, the said Henry Lanauze then and there being a broker and agent, a certain valuable security, to wit, a certain amount of Government stock, to wit, the sum of £9000 in the new £3¼ per cent. annuities placed in the Bank of Ireland, transferable in the books of the Governor and Company of the said Bank, and being the property of the said Richard Clayton Browne Clayton as such administrator. The said special purpose being as follows: that is to say, that the said £3¼ per cent. annuities should be exchanged for two portions of two other stocks, to wit,

“£5000, one part thereof to be exchanged for so much of the £3  
 “per cent. consolidated annuities as should be equivalent to said  
 “£5000 in the £3½ per cent. annuities; and one other portion  
 “thereof, to wit, £4000 of said £3½ per cent. annuities to be  
 “exchanged for so much of the £3 per cent. reduced annuities as  
 “should be equivalent to said £4000 in the £3½ per cent. annuities,  
 “and said several stocks of and in said £3 per cent. consolidated  
 “annuities, and £3 per cent. reduced annuities to be transferred  
 “into the name and to the credit of the said Richard Clayton  
 “Browne Clayton, without any authority to him the said Henry  
 “Lanauze to sell, negotiate, transfer or pledge the said £9000 £3½  
 “per cent. annuities.”

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“That the said Henry Lanauze, late of the parish aforesaid, in  
 “the county of the city aforesaid, broker and agent as aforesaid, on  
 “the day and year last aforesaid, at the parish aforesaid, in the  
 “county of the city aforesaid, in violation of good faith, and con-  
 “trary to the object and purpose for which said £9000 £3½ per  
 “cent. annuities were entrusted to him as aforesaid, unlawfully did  
 “sell and convert to his own use and benefit the said £9000 £3½  
 “per cent. annuities, and the proceeds of the same, against the form  
 “of the statute in such case made and provided, and against the  
 “peace of our Lady the Queen, her crown and dignity.

The sixth count stated:—“That on the 23rd of September in  
 “the said year 1845, to wit, in the parish of St. Michan, to wit, at  
 “Dublin, in the county of the city of Dublin, Richard Clayton  
 “Browne Clayton, as administrator with the last will and testament  
 “and codicil of Robert Browne Clayton deceased, annexed, of all  
 “and singular the goods, rights, credits and chattels which were of  
 “the said Robert Browne Clayton deceased, at the time of his death,  
 “did entrust to Henry Lanauze for a special purpose as hereinafter  
 “mentioned, the said Henry Lanauze then and there being a broker  
 “and agent, a certain valuable security, to wit, a certain amount of  
 “Government stock, to wit, the sum of £9000 in the new £3½ per  
 “cent. annuities, placed in the Bank of Ireland, and transferable in  
 “the books of the Governor and Company of the said Bank, and  
 “being the property of the said Richard Clayton Browne Clayton as

M. T. 1847. "such administrator." The said special purpose being as follows:—  
*Queen's Bench.* "That is to say, that the said £3½ per cent. annuities should be  
 THE QUEEN "exchanged for the portions of two other stocks, to wit, £5000, one  
 v. "part thereof, to be exchanged for so much of the £3 per cent.  
 LANAUZE. "consolidated annuities, to be transferred into the name of him  
 "the said Richard Clayton Browne Clayton in the books of the  
 "Governor and Company of the said Bank of Ireland, as should  
 "at the then current price and value thereof be equivalent in  
 "value to said £5000 in the £3½ per cent. annuities; and one other  
 "portion thereof, to wit, £4000 of said £3½ per cent. annuities to  
 "be exchanged for so much of the £3 per cent. reduced annuities,  
 "to be transferred into the name of the said Richard Clayton  
 "Browne Clayton in the books of the Governor and Company of  
 "the said Bank, as should at the then current price and value  
 "thereof be equivalent to said £4000 in the £3½ per cent. annuities,  
 "without any authority to him the said Henry Lanauze to sell, nego-  
 "ciate, transfer or pledge the said £9000, £3½ per cent. annuities.  
 "And that the said Henry Lanauze, late of the parish aforesaid,  
 "in the county of the city aforesaid, broker and agent as aforesaid,  
 "on the day and year last aforesaid, at the parish aforesaid, in the  
 "county of the city aforesaid, in violation of good faith, and contrary  
 "to the object and purpose for which said £9000, £3½ per cent.  
 "annuities were entrusted to him as aforesaid, unlawfully did sell  
 "and convert to his own use and benefit the said £9000, £3½ per  
 "cent. annuities, and the proceeds of the same, against the form of  
 "the statute in such case made and provided, and against the peace  
 "of our Lady the Queen, her crown and dignity."

*Butt*, with whom were *Napier* and *Rollestone*, for the traverser.

This indictment is framed on the 42nd section of 9 G. 4, c. 55. To constitute the offence contemplated by the first clause of that section, the money or security must be entrusted to the broker or agent, with a direction in writing to apply such money or the proceeds of such security for any purpose specified in such direction; there was no proof of any direction in writing having been given to Lanauze, consequently this case cannot be brought within that

clause. The second clause of the section enacts:—"If any chattel  
 "or valuable security, or any power of attorney for the sale or trans-  
 "fer of any share or interest in any public stock or fund, whether  
 "of the United Kingdom, or of any part thereof, or of any Foreign  
 "State, or in any fund of any body corporate, company or society,  
 "shall be entrusted to any banker, merchant, broker, or attorney,  
 "or other agent, for safe custody, or for any special purpose, with-  
 "out any authority to sell, negotiate, transfer, or pledge; and he  
 "shall, in violation of good faith, and contrary to the object or  
 "purpose for which such chattel, security, or power of attorney  
 "shall have been entrusted to him, sell, negotiate, transfer, pledge,  
 "or in any manner convert to his own use or benefit, such chattel  
 "or security, or the proceeds of the same, or any part thereof, or  
 "the share or interest in the stock or fund to which such power  
 "of attorney shall relate, or any part thereof, every such offender  
 "shall be guilty of a misdemeanour."

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The indictment ought to have stated every ingredient necessary to constitute the offence. First, the traverser must have the security for safe custody or for a special purpose, without any authority to sell, negotiate, transfer, or pledge, and he must dispose of it in violation of good faith and contrary to the special purpose; the special purpose therefore ought to be clearly set forth. The special purpose, as stated in the fourth count, is to exchange the stock there mentioned into stock of another description, and then to have it transferred into the name and credit of Mr. Browne Clayton. That involves both an exchange and transfer of the stock; that exchange might involve in it a sale or exchange with a third party; and the offence, being a selling contrary to a special purpose, the act charged should be shown to be directly contrary to that purpose. The indictment is therefore vague and uncertain in this respect, and no judgment can be had on it: *Rex v. Horne* (a); *The King v. Mason* (b): in fact there is a double purpose stated, the selling the stock and purchasing other stock in lieu thereof. The indictment is ambiguous, it is an attempt to evade the

(a) Cowp. 682.

(b) 2 T. R. 581.

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first clause of the section by confounding it with the second. The offence here being the sale of the stock contrary to the purpose, that special purpose should be averred with accurate definiteness; and if the traverser had either authority to sell, negotiate, or transfer, or pledge, then there is no offence committed. If Lanauze had no authority to sell, negotiate, transfer or pledge, the prosecutor was bound to show he had no authority to do any of these things. The first part of the section deals with the crime in the application of the proceeds, that is, the offence is complete if the proceeds be not properly applied, and if it be an offence to apply them with a written direction, it cannot be an offence to apply them without a written direction. The crime consists in the disobedience of the positive terms of the Act of Parliament: *Regina v. Golde* (a). If a person sell without authority, it is one crime; if the proceeds be converted without a written direction, it is another.

Further, the section speaks of a chattel or valuable security. To constitute a valuable security within the meaning of this section, it must be one capable of transfer by delivery, and manual apprehension; it must be such as may be the subject of larceny; every section of the statute, in which the words "valuable security" occur, shows that to be the meaning to be put upon them: *Wildman v. Wildman* (b), and adopted by Richards, C. B., in *Rex v. Capper* (c), where he says, "It is certainly not easy to define precisely the meaning of *stock*, it is not an ancient subject of property, nor "known to the common law." The interpretation portion of the 5th section says that, "Each of the several documents hereinbefore "enumerated shall *throughout this Act* be deemed for every purpose to be included under and denoted by the words 'valuable security;'" if then it required the assistance of the Legislature to make these documents valuable securities, how can stock itself be a valuable security?

*Brewster and Macdonogh*, contra.

The traverser has been found guilty of having sold a valuable

(a) 2 Mood. & Rob. 425.

(b) 9 Ves. 177.

(c) 5 Price, 262.

security without authority to sell, negotiate, transfer or pledge; and if stock be a valuable security, on this motion in arrest of judgment, the finding of the jury is conclusive. Stock cannot be entrusted to a broker by any mode except that which gives him the absolute dominion over it. If a power of attorney had been given to the traverser, to enable him to sell, he would clearly have been guilty of an offence within the meaning of this Act: yet it is said the transferring the stock to him, and thus putting him in the same position as if he had a power of attorney, is no offence. There is nothing in the 5th section to exclude stock as a valuable security. If it had said that nothing should be a valuable security but the documents therein mentioned, it would be different. *Dicks v. Lambert (a)*, *Beseoby v. Pack (b)*, show that Government stock will pass under the word "security."—[BLACKBURN, C. J. Take the case of a bond; that is a security for money, and is distinct from the debt; now which is the security, and which the debt, in the case of stock?—The entry in the bank book is the security. Exchequer bills, which are an unfunded debt, are valuable securities; and yet it is contended that stock, a funded debt, is not a valuable security. *Rex v. Walsh (c)* originated the passing of the statute 52 G. 3, c. 63 (since repealed by 7 & 8 G. 4, c. 27, *Eng.*, analogous 9 G. 4, c. 55, *Ir.*); and that statute demonstrates the true meaning of the 42nd section 9 G. 4, c. 55.—[CRAMPTON, J. Does not the language of the sections imply there is a document to be deposited?—No; for it speaks of any share or interest in any national stock or fund, or any power of attorney for the sale or transfer of any such stock or fund; clearly applying to the stock or fund before mentioned. The Legislature, therefore, when passing the subsequent enactment, cannot be supposed to have intended to exclude these securities, the object being to protect every species of property: *Aslett's case (d)*. The 9 G. 4, c. 55, embodies every thing contained in the prior Act in more general language. The document which evidences the transfer of any stock or share to any individual is the evidence of his title, and as such is a valuable

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(a) 4 Ves. 725.

(b) 1 S. & St. 500.

(c) 4 Taunt. 258.

(d) 2 Leach. C. C. 970.

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security.—[BLACKBURNE, C. J. Here, the book in which the transfer is made is public property, and I can conceive a certificate of the property might be a valuable security; but here there are no *indicia* of property.]—The Bank are only custodees for the public. The thing itself and the title to it in this case are inseparable; and a sale in violation of good faith is the offence here charged. The 7 & 8 Vic. c. 5, is the statute creating the £3¼ per cent. stock, and the 8th section provides for the opening of books in the Bank for the entry of the annuities belonging to each proprietor. The 11th section speaks of such capital or joint stock, and the interest or share therein, being assignable; and the 12th section says persons entitled to such annuities shall have good, sure and indefeasible estates and interest therein; and the 22nd section enables persons to transfer such annuities. The document which evidences title of a purchaser is a valuable security.

*Napier*, in reply.

This stock is not a valuable security within the meaning of the Act of Parliament; and the books of transfer being public property could not be the subject of a private trust; it is a mere right, and the entry is only evidence of that right: *The King v. The Churchwardens of St. John* (a). The interest of a party in stock is nothing but the right to a dividend, and that interest was first created by 37 G. 3, c. 54, *Ir.*: before that statute these were debentures, which was a sort of documentary security and capable of manual transfer; but this Act only gave a mere abstract right. The statute of 52 G. 3 was then passed, and, in every section of it, it distinguishes between the security and the thing secured. In 2 *Hayes Cr. Law*, p. 512, it is said that the word “property” shall be deemed to denote every thing included under the words “chattel, money or other valuable security.” The thing here secured is the right to the dividends. In *Ferguson v. Ogilby* (b), Sir E. Sugden says:—“The “word ‘securities’ has been held to pass money in the funds; and “so no doubt it has, but that was to effectuate the intention.”

*Cur. ad vult.*

(a) 6 East, 186.

(b) 2 Dr. & War. 553.

BLACKBURNE, C. J.

This case came before the Court on a motion for a new trial, by the traverser, on the ground of an objection which was made at the trial, which I disallowed and reserved for the consideration of this Court. It is not necessary to make any observations on the matter of that motion, because I think that it appears on the record, and was therefore, as it ought to have been, made one of the grounds of the depending motion in arrest of judgment. We therefore say, no rule on that motion for a new trial.

The grounds of the motion to arrest the judgment will be better understood after I shall have stated the indictment. It contains several counts for having obtained Mr. Clayton's property by false pretences, on these the traverser was acquitted; he was convicted on the fourth and sixth counts, which do not substantially differ from each other, and are founded on the second clause of the 42nd section of 9 G. 4, c. 55.

These counts state that the prosecutor, Mr. Clayton, entrusted for a special purpose to the traverser, being a broker and agent, a certain valuable security, to wit, a certain amount of Government stock, to wit, the sum of £9000 in the new £3½ per cent. annuities placed in the Bank of Ireland, and transferable in the books of the Governor and Company of the Bank; the said special purpose being as follows, that is to say, that the £3½ per cent. annuities should be exchanged for two portions of two other stocks, to wit, £5000, one part thereof, to be exchanged for so much of the £3 per cent consolidated annuities as should be equivalent to £5000 of the £3½ per cent. annuities, and £4000 to be exchanged for so much of the £3 per cent. reduced annuities as should be equivalent to £4000, £3½ per cent. annuities; and said several stocks in the £3 per cents. and the £3 per cents. reduced, to be transferred into the name and to the credit of the prosecutor, without any authority to him (the traverser) to sell, negotiate, transfer or pledge the said £9000, £3½ per cent. annuities; it then avers that the traverser, in violation of good faith, and contrary to the purpose for which the £9000 was entrusted to him, unlawfully sold and converted the same to his own use.

The traverser now moves to arrest the judgment, on two grounds;

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the first is, that the stock in the £3¼ per cent. annuities is not, within the meaning of the above statute, a valuable security: the second is, that the traverser must, from the nature of the special purpose pleaded, have had authority to sell, transfer and negotiate the said stock; and that therefore the averment that he had not, is uncertain and untrue. I shall consider them in their order.

As to the first, the £3¼ per cent. annuities are created by the 7 & 8 Vic. c. 5, and thereby charged and made payable out of the consolidated fund. This statute and this fund constituted the security of the original proprietors of these annuities, and of all subsequent assignees of them, just as a mortgage and the lands charged by it are the security for the mortgage debt. The evidence, and the only evidence, of the right of the original proprietors of the £3¼ per cent. annuities are the entries in the Bank book, of a credit to each holder of £3¼ per cent. annuities for an amount of £3¼ per cent. annuities equal to those which he had before held. The £3¼ per cent. annuities, and the evidence of the right to them being thus created, the Act prescribes the manner in which alone they can be transferred, that is, by instruments of assignment to be contained in books kept by the Bank, and to be executed by the person assigning, and if he please, by the assignee. These instruments, of which the books are composed, are kept by the public officer for the mutual purposes of the State and its creditors, and constitute the whole evidence of the public engagements, and of the rights of the original and all subsequent proprietors; so that there exist no other documents that can be said to be a security or any evidence or symbol of property.

It is manifest, thus far, that this is a species of property which cannot be the subject of larceny, and of which the owner cannot be deprived but by the execution of a legal instrument by himself in person, in the public office, or by an attorney appointed by deed for the special purpose. This being so, we are now to see whether this species of property, so peculiarly circumstanced in respect to the evidence of it and mode of transfer, be, within the meaning of the statute, a valuable security. The fifth is one important section, it relates to larceny, of which, according to the specification it con-

tains, nothing can be the subject that is not, as to title or evidence of title, manifested by a document capable of manual delivery and abstraction. The same section, by its short glossary, provides that each and every of the enumerated documents is to be deemed a valuable security for every purpose of the Act. This, it is true, does not show that Government annuities are not a valuable security, but it is a very strong reason for concluding, that when the term "valuable security" afterwards occurs, it is meant to include such documents, and such only, as the 5th section enumerates, and for the purposes of the Act makes valuable securities.

It may not be unimportant to refer to a subsequent statute, 2 W. 4, c. 4, s. 2, which is an Act to prevent embezzlement by persons employed in the public service. From the exact identity of its object with that of the 42nd section of 9 G. 4, c. 55, it may fairly be referred to, when it defines what is to be a valuable security; with the exception of Exchequer acquittances it enumerates the very same documents as those in the 5th section, every one of which is capable of manual apprehension.

The 39th and 40th sections relate, one to the stealing, and the other to embezzlement by clerks and servants; the term "valuable security" occurs in each, and plainly from the context is used to denote what may be stolen, or by virtue of the embezzlement, received or taken into the servants' possession. It would seem therefore that, looking to the very nature of these annuities, and all the antecedent clauses of the statute, it would require explicit evidence of an intention to include them under the general term "valuable security," as used in the 42nd section, where the same term is not meant to include them in any other, and thus to expound the same language differently in different clauses of the same statute. Have we then such evidence of such an intention in the 42nd section? I pass by the first clause of it, as the words "valuable security" do not occur in it. The clause on which the charge is framed was the words "chattel," "valuable security," or "power of attorney for the sale or transfer of shares in public or foreign, or corporate, or partnership funds," taken in their ordinary sense; and as the words "valuable security" are expounded in the

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5th section, I think these words describe various matters which, in the ordinary course of dealing, are entrusted by actual delivery to bankers, merchants, brokers, attorneys or other agents, for safe keeping or other specified purpose. The term safe keeping is utterly inapplicable to stock, it cannot be more safely kept by entrusting it to any one, and if it be transferred for a special purpose, a trust is created, and the assignee becomes its legal owner, bound to execute the trust, not by any general duty or obligation attached to the peculiar or professional character in which he is employed, but by the terms of the particular contract which he makes with the person who entrusts him with legal dominion over the property. But in my opinion we must read the words "valuable security" as defined by the 5th section, and therefore that it includes documents which are or may be deposited and entrusted for the purposes of safe keeping, or of negotiation or sale, by manual delivery.

It has been argued for the Crown, that if we do not hold these annuities to be included, we leave the fraudulent conversion of the stock unpunished, which would be criminal if done by virtue of the power of attorney; but the answer to this is, that the transfer in the one case supposed is made by the fraudulent use of the very instrument which the Act specifies; in the other, without the intervention or use of any instrument at all: and to my mind the provision in express terms for the case of a fraud perpetrated in a particular mode shows that the intention of the framers of the Act must have been directed to the subject, and that they only meant to deal with the case when a document was entrusted comprising power or property. For these and other reasons I think that a transfer of stock was not the entrusting of a valuable security to the traverser.

I now proceed to consider the second objection which I have already stated. The averment is, that the annuities are entrusted to the traverser, being a broker and agent, for the special purpose of being exchanged. Whatever was to be or might be the mode of exchange, it is plain from this averment that the stock was transferred to him as a stock-broker, and that the object of obtaining other stock in exchange for it, no matter how, involved the necessity of his selling, negotiating or transferring it. To avoid this obvious consequence,

the Counsel for the prosecutor puts the case, and a possible one, that it might have been that the exchange was to be by a transfer of the other stock of the traverser by the traverser himself to the plaintiff; but this would create an objection as great, if not greater, than that it is adduced to answer, for on that construction the case would be one of a contract with the broker, and not of his employment as such; the parties would stand in the relation of vendor and vendee, the goods would become the property of the latter by the act of transfer, and its subsequent sale could not possibly be held to be without any authority. The other possible modes of effecting the exchange would be by the sale of it, and the purchase of the other funds, or by the transferring it in exchange for them; but *neither could be effected without authority to sell*, and hence arises the objection that the indictment, which thus in substance contains an averment of an authority to sell, is bad. This argument depends on the meaning we are to give to the words "without any authority to sell, negotiate, transfer or pledge;" they do not mean a want of power or legal right to do so, for the existence of such a power or right and its abuse are the cause and object of the enactment; the word "authority" is used to signify order or direction, and the crime is the sale without the owner's order or direction; but if the sale be by his order or direction, and such an order or direction is involved in employing him to exchange it, then, though there may be a violation of good faith in embezzling the proceeds, it is in the embezzlement it consists and not in the sale. If a reason were required, I could easily suggest one for making the abuse of authority essential to constitute the offence; but the language of the Act is unequivocal, and makes it impossible to hold, that if there be authority to sell or transfer, the sale or transfer is the misdemeanour created by the Act.

It was argued that we should read the words in question as meaning without authority to sell or transfer for the broker's use, or for any save the special purpose. But I cannot assume that these limitations, which are not expressed, were intended, or venture, in the construction of a penal Act, to introduce exceptions which would restrict the operation of terms of the utmost generality, or make the

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absence of any authority a necessary ingredient of the crime. Indeed it would be repugnant to every fair rule of interpretation to hold that the very same words, "without any authority," should be held to include two cases, each the reverse of the other; one that of sale where there was a total absence of authority; the other that of a sale where there was an authority to sell, but limited to certain purposes. However, if the words of the Act could by possibility admit of the interpretation suggested, it is plain that the indictment has been framed in a different view of them, for it avers a total absence of authority to sell or transfer, which is at variance with every possible construction of the special purpose for which it alleges the annuities to have been entrusted to the traverser. On both grounds therefore I think the judgment must be arrested.

BURTON, J., concurred.

CRAMPTON, J.

I concur in the judgment of the Court, and for the reasons stated by my LORD CHIEF JUSTICE. The general ground upon which I think the judgment ought to be arrested is, that the offence which has been committed is no crime within the meaning of the Act of Parliament upon which the indictment is founded. The grounds of my opinion are these—first, this is an indictment upon the statute of the 9 G. 4, c. 55, s. 42; it is a necessary averment in such an indictment that stock is a valuable security, and the prosecutor is bound to show that it is so within the meaning of the statute. In a popular sense stock may be called a valuable security; but the question is, is it so within the meaning of this particular Act of Parliament? The statute has itself defined what the terms "valuable security" for the purposes of the Act are intended to import. It must be a document or security transferable from hand to hand—a document capable of being the subject of larceny or embezzlement. Now, stock has no one of these qualities; besides, from the context of the clause such a construction is most manifestly excluded; secondly, if we refer to Acts *in pari materia* with this Act, they will throw some light upon the construction to be given to this Act. Thus the 51 G. 3, c. 38, which

is a statute directed against embezzlements by servants or clerks, speaks of persons entrusted with receiving, paying, negotiating, exchanging, or transferring, money, goods, bonds, bills, notes, bankers' drafts, and other valuable effects and securities. It there speaks of these various species of securities as valuable securities which the owners are obliged to entrust to such persons, and enacts if any such person shall in the name or on account of his master receive or take into his possession, and shall fraudulently secrete or make away with the same, every such offender shall be guilty of a misdemeanour. In that Act the very words which have been the subject of so much discussion are made use of, it speaks of parties *entrusted with valuable securities*, not securities for money. The words "entrust" and "entrusted" there, as in the statute upon which this indictment is founded, plainly must mean something deposited, something placed in the hands of a person for safe custody or for other purposes; and it may reasonably be concluded from the context, and the enumeration being the same in both Acts, that the Legislature used them in the same sense in both statutes, more especially as the 9 G. 4 is an enlargement of the the former Act.

There is also the 52 G. 3, c. 63; that Act also makes the thing deposited the subject of the embezzlement. I therefore feel no doubt upon this subject, and think the word stock cannot be tortured into a valuable security within the meaning of the 9 G. 4, c. 55; and I am also clearly of opinion that a transfer of stock by a proprietor to a broker to exchange for other stock is not an entrusting within any of these statutes.

As to the special purpose stated in the indictment, the meaning of that averment seems to me to be not an exchange between the principal and his broker, but that the stock of the principal transferred to the broker should by him be exchanged into another species of stock to be transferred to the name of the principal, and this is the meaning intended by the indictment itself. It is an act to be done for the benefit of the proprietor, which is to be effectuated by changing one species of stock into another. Now, that could not be done without a sale or transfer by the broker.

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There is another objection to this indictment:—its statements necessarily imply, that the broker had full powers of sale and transfer, and yet in the very same count it is also stated that he had not any power or authority to sell or transfer: but it is said by the prosecutor's Counsel that we are to construe these words "without power or authority to sell or transfer" to mean "without power or authority to sell or transfer except for the special purpose." Now, this is a construction which the framer of this indictment did not himself venture to put upon the record; and can this Court so construe the Act? We cannot interpolate into the Act terms so restrictive of its large and comprehensive language, and which would totally change the character of the offence thereby created.

PERRIN, J.

I concur in thinking that the judgment ought to be arrested. I think stock is not a security; it is property, but not a security; that is, not a valuable security within the meaning of the Act of Parliament. I am also of opinion that the purpose averred in the indictment is not the special purpose within the meaning of the Act.

Judgment arrested.

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*Nov. 9, 12.*

**COVENANT.**—The declaration contained two counts. The first count set out an indenture of 23rd of July 1832, between the defendant of the one part and the plaintiff of the other; in which indenture was recited an indenture of the 21st of July then instant, between the then Marquis of Donegal of the one part and the defendant of the other part, whereby certain lands, tenements, fisheries and rights of fishery, subject to any existing leases, and the reversion and inheritance thereof, and all quarries, &c., were (subject to the life estate of the then Marquis of Donegal) limited to such uses as the defendant should appoint, with remainder over in default of appointment; and further reciting, that by an indenture then prepared and engrossed, and intended to bear date therewith, and made between the defendant of the first part, plaintiff of the second part, and Hugh Kennedy and John Echlin of the third part, whereby defendant, in execution of the powers vested in him, directed that the reversion and inheritance expectant upon the expiration of the existing leases in said

By indenture the defendant covenanted that he would not, without plaintiff's consent in writing, do or consent to any act whereby any or either, or any part or parts of the appointment, uses or trust in a certain deed should be in any way invalidated or prevented from taking effect; and that if his (the defendant's) father should die without having executed a certain deed of the 21st of July, that the defendant on

request would do all such lawful and reasonable acts, whether by obtaining an Act of Parliament or otherwise, as should be advised by Counsel to be necessary or expedient for corroborating an indenture of equal date therewith; and further, that in the same event, viz., the death of defendant's father, without executing said deed of the 21st of July, if defendant should refuse or neglect in six months after that event, and after request, to do such lawful acts as Counsel should advise to be necessary for corroborating, as far as the defendant lawfully might, the deed of appointment, that he would, at the expiration of the six months, pay the plaintiff the full value of the interest intended to be vested in him by the deed of appointment and trust, with all damages caused by such neglect, and all sums expended on the faith of the said deed of appointment. In a declaration on this covenant the breach assigned on the first clause of this covenant was, that the defendant, after his father's death, presented a petition to the House of Lords and obtained an Act of Parliament, whereby the premises were vested in certain trustees in fee, in trust to sell them, or a competent part of them, to pay debts and incumbrances.

*Held*, that the procuring said Act of Parliament was a breach of the first covenant.

The declaration stated that plaintiff was advised by Counsel that it was necessary and expedient to obtain an Act of Parliament to confirm the deed; that the defendant had notice thereof, and was requested to procure it so far as he lawfully might.

*Held*, that this breach was well assigned, and that the two clauses constituted distinct averments. But even if it were but a single averment, the declaration stated a substantial breach of it.

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lands, fisheries, &c., should (subject as therein) go and remain to the use of Hugh Kennedy and John Echlin, their heirs and assigns for ever, upon trust as therein mentioned, for the purpose of enabling the plaintiff during his life, and after his decease the defendant, to make several improvements therein referred to. And further reciting that the indenture of 21st of July had been executed by the defendant, but not by the then Marquis of Donegal, and that it was possible some time might elapse before its execution by him, and that previously to such execution the plaintiff might probably incur very considerable expense in respect of the trusts and powers contained in the last in part recited indenture; in consideration whereof the defendant covenanted for himself, his heirs, executors and administrators that he would not, without plaintiff's consent in writing, do or consent to any act or thing whereby the uses or trusts of the said indenture might be in any way invalidated; and that if the then Marquis of Donegal should die without having executed the said indenture of appointment, he the defendant, on being requested by the plaintiff, would do such lawful acts and things, by obtaining a private Act of Parliament or otherwise, as Counsel should advise to be necessary or expedient for corroborating said indenture; and that if the then Marquis of Donegal should die without executing said indenture, and the defendant should neglect for six months after his decease, and after being requested by the plaintiff to do such reasonable acts and things as Counsel should advise for corroborating said indenture, he the defendant should and would, after the expiration of six months from such request, pay to the plaintiff the full value of the interest intended to be vested in him by said indenture, together with all costs incurred and moneys expended on the faith thereof, with interest at the rate of £6 per cent. per annum. It then averred the death of the then Marquis of Donegal without having executed the indenture of the 23rd of July 1832, and that previously to the death of the then Marquis plaintiff had incurred considerable expense, to wit, £20,000, upon the faith of the said indenture, and that the value of the interest intended to be vested in the plaintiff amounted to a considerable sum.

*Breach*; that after the death of the then Marquis of Donegal, the

defendant, without the consent in writing of the plaintiff, presented a petition for the purpose of procuring, and did procure, a certain private Act of Parliament vesting the said amid other lands, &c., in trustees for the purposes of sale; and that by virtue of said Act of Parliament, which was a private Act of Parliament, the several uses and trusts of the said indenture were invalidated.

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*Further Breach*; that after the death of the then Marquis of Donegal, and before the obtaining of the said last mentioned Act of Parliament, plaintiff was advised it was necessary to obtain a private Act of Parliament for corroborating the several clauses, matters and things therein contained; and that the plaintiff apprised the defendant of said advice, and requested him to procure an Act of Parliament for corroborating said indenture; that the defendant, although requested, would not procure such Act of Parliament or do any lawful act for obtaining same.

*Further Breach*; that after the expiration of six months from the death of the then Marquis of Donegal, and from defendant's being so requested, plaintiff demanded from him the value of the interest intended to be vested in him by the said indenture, and also all charges and costs incurred by him upon the faith thereof; that although the plaintiff made such demand, and although the then Marquis of Donegal died without having executed said indenture, and although more than six months had elapsed since the death of the said Marquis of Donegal, and since the time of the defendant being so requested to procure an Act of Parliament so advised as aforesaid, or to do any such lawful or reasonable act, matter or thing as by Counsel might be deemed necessary for corroborating same, as far as the defendant could or lawfully might, the defendant, although requested, had not paid the value of the interest intended to be vested in the plaintiff by said indenture, or the costs or expenses incurred by him.

The second count was somewhat more general in its averments.

The defendant craved oyer of the indenture of the 23rd of July 1832, and it was accordingly set out.

The covenants in this deed were in the words following:—"Now, "this indenture witnesseth, that in pursuance of the said agreement,

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“and in consideration of the premises, he the said George Hamilton Chichester Earl of Belfast doth for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said Nicholas Delacherois Crommelin, his heirs, executors, administrators and assigns, that he the said George Hamilton Chichester Earl of Belfast will use his interest and endeavours to induce the said George Augustus Marquis of Donegal to execute the said firstly herein before in part recited indenture of appointment, as soon as possible may be; and further, that he the said George Hamilton Chichester Earl of Belfast will not at any time hereafter, without the consent in writing of the said Nicholas Delacherois Crommelin, his heirs, executors, administrators or assigns, do or consent to any act, matter or thing whatsoever whereby any or either, or any part or parts of the appointment, use, trust, powers, stipulations, agreements, provisoes, declarations, matters or things in the said lastly hereinbefore in part recited indenture of appointment contained or intended to be contained, may in any way be invalidated or prevented from taking effect; and further, that he the said George Hamilton Chichester Earl of Belfast will not be a party to, or consent to any revocation of the uses or trusts of the said hereinbefore in part recited indenture of settlement of the 28th day of October 1822, or of any part of them, as to all or any part of the hereditaments in the said indenture of settlement comprised, or to any appointment of new uses or trusts thereof, or any part thereof (save and except for the purpose of providing an annuall sum of £3000 by way of jointure for the benefit of Harriet Countess of Belfast, the wife of the said George Hamilton Chichester Earl of Belfast, to arise after the decease of the said George Hamilton Chichester Earl of Belfast, and for a principal sum not exceeding £7000 due from the said George Hamilton Chichester Earl of Belfast to Randal Jackson, Esq.,) until the said George Augustus Marquis of Donegal shall have executed the said first hereinbefore in part recited indenture of appointment; and further, that if the said George Augustus Marquis of Donegal shall depart this life without having executed the said firstly hereinbefore in part recited indenture of appointment, then and in

"such case he the said George Hamilton Chichester Earl of Belfast,  
 "his heirs, executors or administrators will, on receiving any request  
 "to that effect from the said Nicholas Delacherois Crommelin, his  
 "heirs, executors administrators or assigns, do all such lawful and  
 "reasonable acts, matters and things, whether by obtaining a pri-  
 "vate Act of Parliament or otherwise, as shall be advised by  
 "Counsel to be necessary or expedient for corroborating the said  
 "lastly hereinbefore in part recited indenture of appointment, and  
 "every clause, matter and thing therein contained; and further,  
 "that in case the said George Augustus Marquis of Donegal shall  
 "depart this life without having executed the said firstly hereinbe-  
 "fore in part recited indenture of appointment, and the said George  
 "Hamilton Chichester Earl of Belfast, his heirs or assigns, shall  
 "refuse or neglect for six calendar months after the decease of the  
 "said George Augustus Marquis of Donegal, and after such request  
 "shall have been made as aforesaid, to do all such lawful and  
 "reasonable acts, matters and things as shall be advised by Counsel  
 "to be necessary and expedient for corroborating and confirming, as  
 "far as he the said George Hamilton Chichester Earl of Belfast  
 "can or lawfully may, the said lastly hereinbefore in part recited  
 "indenture of appointment, and every clause, matter and thing  
 "therein contained, then and in such case he the said George  
 "Hamilton Chichester Earl of Belfast, his heirs, executors or admi-  
 "nistrators, shall and will at any time after the expiration of the  
 "said period of six calendar months, to be computed from the time  
 "of such request having been made, on demand, well and truly pay,  
 "or cause to be paid to the said Nicholas Delacherois Crommelin,  
 "his executors, administrators or assigns, the full value of the  
 "interest intended to be vested in or given to him the said Nicholas  
 "Delacherois Crommelin, his heirs and assigns, by the said lastly  
 "hereinbefore in part recited indenture, or by the trusts and powers  
 "thereby declared or contained, together with all loss, costs and  
 "damages which he the said Nicholas Delacherois Crommelin, his  
 "heirs, executors, administrators or assigns, shall have borne, sus-  
 "tained, or been liable to by reason of such neglect or refusal; and  
 "also all sums of money which he the said Nicholas Delacherois  
 "Crommelin, his heirs, executors, administrators or assigns, shall

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"have expended on the faith of the said lastly hereinbefore in part  
"recited indenture of appointment, or of the trusts thereof, together  
"with interest thereon, after the rate of £6 per cent. per annum, from  
"the time or respective times at which such sums of money shall  
"have been expended, and further, that all the estate and interest  
"of him the said George Hamilton Chichester Earl of Belfast, of  
"and in the hereditaments comprised in the said hereinbefore men-  
"tioned indenture of settlement of the 28th day of October 1822,  
"and the sum of £100,000, and all other moneys which the said  
"George Hamilton Chichester Earl of Belfast is thereby empowered  
"to charge, and all other benefit of him the said George Hamilton  
"Earl of Belfast, under and by virtue of the said indenture of  
"settlement, shall be charged; and he the said George Hamilton  
"Chichester Earl of Belfast doth hereby charge the same with and  
"to the payment to the said Nicholas Delacherois Crommelin, his  
"executors, administrators and assigns, of all the principal money  
"and interest hereinbefore covenanted to be paid by the said George  
"Hamilton Chichester Earl of Belfast, his heirs, executors, or admi-  
"nistrators."

The defendant, as to so much of the first count as averred that the defendant, without consent in writing of the plaintiff, did consent to certain acts whereby said indenture was prevented from taking effect, demurred specially, on the grounds of its being ambiguous and double, and as not stating the nature and particulars of the acts referred to, or in what manner the stipulations and agreements in said indenture were invalidated; and also demurred to so much of the count as averred a breach of covenant by the defendant's presenting a petition for the purpose of procuring a private Act of Parliament, on the ground that it appeared by the provisions of the Act of Parliament that the said indenture was not invalidated, and that defendant did appoint a good, absolute and indefeasible estate; and further, that there was a variance between the covenant stated in the declaration and that set out on oyer.

As to the remainder of said count the defendant pleaded that the plaintiff had, by deeds of lease and release, bearing date respectively the 28th and 29th of October 1838, released all his interest to Samuel Delacherois Crommelin.

To this plea the plaintiff demurred specially, and joined in demurrer on the causes assigned by the defendant to the residue of the count. The plea being given up at the Bar, the special demurrer thereto was not argued.

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*Meade* (with him was *Napier*), for the plaintiff, was about to open the case, when—

*Molyneux* (with him was *Tomb*), for the defendant, insisted that as the defendant had demurred to the declaration, and pleaded to part of it, and as he now at the bar gave up the plea, that he had the right to begin.

BLACKBURNE, C. J.—You are entitled to commence.

*Molyneux*—The covenant contains two branches—first, that the defendant could not, without the plaintiff's consent in writing, do any act or thing whereby the uses or trusts of the certain indenture recited might be invalidated; secondly, that if the said then Marquis of Donegal should die without having executed the said recited indenture of appointment, he (the defendant), on being requested by the plaintiff, would do such lawful acts and things, by obtaining a private Act of Parliament, or otherwise as Counsel should advise to be necessary, for corroborating the said indenture. It appears on the declaration that the defendant vested his estates in two trustees in pursuance of a power, who thus acquired the fee-simple; did then the private Act of Parliament obtained by Lord Donegal affect the deed of 1832? A private Act of Parliament does not bind strangers to it, at least strangers to its purposes. It is but a species of conveyance with the sanction of Parliament to carry its operation into effect. Private Acts were usually obtained on petition; the House of Commons did not object, and the petitioner went at once to the Lords and the Act became law: *Hale's Jurisdiction of the Lords* (cc. 4, 10 and 12); *The Prior of Castleacre* (a); *Barrington's case* (b); *Lucy v. Levinston* (c). This Act of Par-

(a) 8 Coke, 138, a (note).

(b) 8 Coke, 136, b.

(c) 1 Vent. 176.

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liament only enables the trustees to sell part of the estate, but it appears from the declaration that after the deed of 1832 Lord Donegal had nothing to give, nothing that he could part with: *Dawson v. Paver* (a). A private Act does not bind strangers unless by express words or by necessary implication; the intention of the Legislature not to affect the rights of strangers is apparent in the Act. If a power were given to the trustees to sell, they could not touch this particular property without Lord Donegal's consent in writing: *Brett v. Beales* (b); *Townley v. Gibson* (c). Then as to the second branch of the covenant; could the Act contemplated have been lawfully done? The two portions of the covenant must be incorporated, and plaintiff should have shown in his declaration that the act was such a one as Lord Donegal could do. One part of the covenant is senseless without the other: *Trott v. Smith* (d). The breach averred is bad. The utmost the covenant excludes the defendant from is a certain Act of Parliament: *Stafford v. Botterme* (e); *Blicke v. Dymoke* (f). The plaintiff has averred a double breach, for it is alleged the defendant did not procure the Act of Parliament, and that he did not do what was necessary towards obtaining the Act which he might have done: *Aspden v. Austin* (g).

*Meade, contra.*

There are three distinct branches of the covenant, upon each of which a separate breach has been assigned. As regards the first, viz., the procuring the private Act of Parliament, we do not attribute to it any peculiar efficacy beyond an ordinary conveyance, which would have been a sufficient breach, the interest of the plaintiff being merely equitable: *Right v. Bucknell* (h); *Pitt v. Williams* (i).—[BLACKBURN, C. J. We must take it on the declaration that this instrument created but an equitable estate.]—It is therefore unnecessary to refer to the authorities cited on the other side, with

(a) 11 Jur. 766.

(c) 2 T. R. 701.

(e) Cro. Eliz. 298.

(g) 5 Ad. & El. N. S. 671.

(b) 1 Moo. & Malk. 421.

(d) 10 Mees. & Wels. 453.

(f) 9 B. Moo. 215.

(h) 2 B. & Ad. 278.

(i) 5 Ad. & El. 885.

respect to the efficacy of a private Act. The declaration also sufficiently shows how the Act operates here to defeat the prior interest in the plaintiff. Besides, the provisions of the private Act are more peculiarly within defendant's own knowledge, and less particularity is required: *Gale v. Reed* (a); *Bradshaw's case* (b).

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As regards the second breach. The rule is, that in affirmative covenants it may be assigned generally: *Com. Dig. Pleader*, E, 45; *Procter v. Burdett* (c); *Pudsey v. Newsam* (d). This last is a leading case; and there the objection that a particular mode of conveyance should have been pointed out by the plaintiff was overruled. In our case the conveyance—viz., a private Act, is specified. The procuring such is one of the reasonable acts defendant covenanted to do, and he has admitted by his pleading that it was a reasonable thing to require.—[PERRIN, J. What is the nature of the double request in the second breach of the first count?—The averment is, that plaintiff requested defendant to procure a private Act of Parliament, and to do such acts as were lawful and reasonable for that purpose. This is substantially but one request—viz., to procure the private Act, and at the most the latter part would be but surplusage.

As regards the second count, it is the same as the third breach of the first count. The allegation is, that upon certain contingencies defendant was to pay plaintiff a certain sum. Each of these contingencies is averred to have occurred; and the single breach of non-payment is not subject to any of the objections. The deed is here set out upon oyer; and the defendant, by being a party to the obtaining the Act of Parliament here mentioned, became liable to pay the amount specified in the contract.

*Tomb* replied.

*Cur. ad. vult.*

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BLACKBURNE, C. J.

In this case the questions raised before us relate solely to the sufficiency of the declaration. It is an action of covenant on an

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(a) 8 East, 80.

(b) 9 Rep. 61.

(c) 3 Mod. 69.

(d) Yel. 44.

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indenture between the plaintiff and the defendant, dated 23rd of July 1832, which recites amongst other matters a deed of the 21st of July 1832, between the late Marquis of Donegal and the defendant, whereby certain lands and premises (including those the subject of the covenant), subject to the life estate of the late Marquis in certain rents, were limited and appointed to such uses as the defendant should in the manner thereby prescribed, appoint, with divers uses in remainder in default of appointment. It then recites a deed of equal date with that declared on, between the defendant of the first part, the plaintiff of the second part, and Hugh Kennedy and John Echlin of the third part; by which the defendant, in execution of the power in the deed of the 21st of July, appointed the reversion and inheritance in certain fisheries, expectant on the expiration of certain leases, and also other premises, to the use of Kennedy and Echlin and their heirs, upon the trusts therein stated. It then recites that the deed of the 21st of July had not been yet executed by the late Marquis, and that it was possible some time might elapse before its execution by him; and that it was probable that before he did so the plaintiff would incur expense in respect of the trusts in the second recited deed contained, in consideration whereof the defendant had agreed to enter into the covenants which are those for breach of which this action is brought. The covenants are, that the defendant would not do or consent to any act whereby any or either, or any part or parts of the appointment, uses or trusts in the deed of equal date should be in any way invalidated or prevented from taking effect; and further, that if the late Marquis should die without having executed the deed of the 21st of July, that the defendant on request would do all such lawful and reasonable acts, whether by obtaining an Act of Parliament, or otherwise as should be advised by Counsel to be necessary or expedient, for corroborating the indenture of equal date; and further, that in the same event, viz., the death of Lord Donegal without executing the deed of the 21st of July, if the defendant should refuse or neglect for six months after that event, and after request as aforesaid, to do such lawful acts as Counsel should advise to be necessary for corroborating as far as the defendant lawfully might, the deed of

appointment, that he would, at the expiration of the six months, pay the plaintiff the full value of the interest intended to be vested in him by the deed of appointment and trust, with all damages caused by such neglect, and all sums expended on the faith of the said deed of appointment. The breach assigned of the first clause is, that the defendant, after the death of the late Lord Donegal, presented a petition to the House of Lords and obtained an Act of Parliament whereby the premises were vested in certain trustees in fee, in trust to sell them or a competent part of them to pay debts and incumbrances.

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The defendant contends that this is not a breach, because a private Act of Parliament could not affect the right of the plaintiff, and that the appointment to the trustees has not been thereby invalidated. For the plaintiff it is insisted that, even taking this Act to have merely operated as a conveyance by the defendant (and to that extent it certainly did operate), it has invalidated the trust contained in the deed of appointment, as it has vested the estate in trustees to sell it. To this it is replied that, according to the recitals of the two deeds, the defendant's appointment gave a legal estate in fee to Kennedy and Echlin, which has not been divested by the Act.

This requires us to see whether the pleadings support the argument; in other words, whether they show that the appointees took a legal estate in fee. This deed of appointment could have no operation at law except as a limitation of a use, and it is not averred that the estate was by fine, feoffment, deed of release, or in any other way conveyed so as to create a seisin, and a use capable of appointment. We therefore cannot attribute to it any such effect as is contended for. What operation these two deeds had, we have no means of ascertaining, they are not pleaded; nor can we say more of them from the short recitals than that they do not appear to have transferred any legal estate; if they did, the defendants should have pleaded and relied on them as matter of defence. If we were, as we are not, at liberty to conjecture what their nature and effect are, it is obvious that the plaintiff and defendant regarded the title of the appointees as defective and defeasible by reason of the non-

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execution of the deed of the 21st of July by the late Marquis. It is however enough to say that the Act of Parliament solicited by the defendant, by vesting the legal estate in trustees for sale, defeated any right which the trustees of this plaintiff can on this record be said to have acquired by the deed of appointment. I am therefore of opinion that the Act of Parliament procured by the defendant was a breach of the first of these covenants.

As to the other clauses, the declaration treats them as separate covenants, and assigns breaches of each; the defendant contends they are but one covenant, and that the whole is to be considered as qualified and controlled by the concluding words of the latter. The declaration states that the plaintiff was advised by Counsel that it was necessary and expedient to obtain an Act of Parliament to confirm the deed of appointment; that the defendant had notice thereof, and was requested to procure it so far as he lawfully might. This so far seems to me quite sufficient. The defendant covenants to procure an Act of Parliament, if plaintiff's Counsel advised it to be requisite; it was advised to be so; there was notice of this, and a request and refusal to do the act, the very act which the covenant bound him to do. It has not indeed been denied that this breach is well assigned if the two clauses constitute distinct covenants; and I clearly think that they do. The first gives an immediate right of action if the defendant did not on request do the acts advised by Counsel, and for its breach general damages would be recoverable. The second provides for the case of the defendant's refusal, for six months after the death of the then Lord Donegal, to do the acts which Counsel should advise, and specifies in that event for what matters he shall be entitled to compensation. But it seems to me, that even though we were to accede to the defendant's argument, and treat this as one single covenant, that the declaration contains a substantial breach of it.

Demurrer overruled, judgment for the plaintiff.

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Lessee of HENRY SHAW JONES

v.

THE GALWAY TOWN COMMISSIONERS

(Acting under a local Act, 6 & 7 W. 4.)

Nov. 24.

**EJECTMENT** on the title, tried before Ball, J., at the last Summer Assizes for the county of Galway, to recover "That portion of the "ground, tenements and premises, heretofore described as a house, "containing fifty-eight feet in length in the front, together with the "yard at the rere thereof, situate, &c., in the town of Galway, "formerly in the possession of one Henry Shaw Jones, situate in "parish of St. Nicholas and said county of the town of Galway, "recently taken possession of by the Galway Town Commission- "ers."

A Corporation executed a lease on which an ejectment was brought, which lease was signed by the members of the Corporation individually, and purported to be made "under their seal." There was no evidence that they possessed a common seal.

It appeared from the evidence at the trial, that the Church of St. Nicholas, in the town of Galway, was founded in 1320 by the inhabitants of Galway, and was governed by vicars instituted by the Archiepiscopal See of Tuam. In 1484 the town of Galway was released from archiepiscopal jurisdiction, and the Church of Saint Nicholas was erected into a Collegiate Church, governed by a warden and eight vicars; a royal grant was obtained under the Privy Seal in 1551, and thenceforward the church was called "The Royal College of Galway," to consist of a warden and eight vicars, who were to be a body corporate and to have perpetual succession, to *possess a common seal*, and to have power to enact bye-laws for its good government. The mayor and commonalty, and their successors for ever, were empowered on each 1st day of August to elect a warden yearly, and to remove, deprive and depose him and the vicars, and to constitute others in their places. Prior to the passing of the Municipal Act (3 & 4 Vic. c. 108), the present warden and vicars presented petitions to Parliament, stating that the college then consisted of a warden and four vicars, of whom the warden

*Held*, that the body being assembled when the seal was affixed, it was their common seal *pro hac vice*, and that the lease was admissible in evidence against them.

*Held*, that this lease purporting to be executed by the head and subordinate members of the Corporation, the Court would presume that the entire body corporate were present at its execution, no evidence being offered to the contrary.

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was elected annually, and the vicars during good behaviour by the Lay Corporation of the town; and accordingly, the case was provided for by the 149th section of that Act. The 6 & 7 *W.* 4, c. 117 (local and personal), "An Act for Regulating and Improving the Town of Galway, in the county of the same town," incorporated the defendants as the successors of the old Corporation; and the 13th section of the Municipal Corporation Act dissolved this body corporate, and the 15th section recognised the existence of the Galway Town Commissioners, and provided that "The Galway Town Commissioners, acting in the execution of an Act of Parliament made and passed in the 6th and 7th year of the reign of his late Majesty William the Fourth, intituled 'An Act for Regulating and Improving the Town of Galway, in the county of the same town,' shall, from and immediately after the passing of this Act, have all the estate and powers of Commissioners under this Act for that town, until the grant of a charter and the election of a council under its provisions."

In 1756 a lease was made by the then warden (who was father of the existing warden) and vicars of the Royal College of Galway to the grandfather of the lessor of the plaintiff, of fifty acres of land, together with two large houses in the town of Galway (one of which was the subject of the present ejectment), at a rent of £12 per annum, and in consideration of a fine of £1200, for a term of forty years to expire in 1845. A renewal of this lease was executed to the plaintiff on the 15th of May 1845 by the then warden and vicars, for an additional fine of £1500, and the term granted was the same as in the original lease. The several leases and renewals were signed by the warden and vicars individually, but the only lease given in evidence and relied on was the lease of May 1845, and it purported to be made under their seal. A seal was affixed, but there was no evidence that this was the common seal of the Corporation, or that they had a common seal. Payment of rent was proved under this lease.

The defendants' Counsel, on the close of the plaintiff's case, called for a nonsuit, objecting that the lease given in evidence purported to be made by the warden and vicars of the Royal College of

Galway, who were a corporate body, and yet it was not under their common seal; and also, that the lease was void, being for a period of forty years, both of lands and houses, whereas the statute law 10 & 11 *Car.* 1, c. 3, authorised leases of ecclesiastical lands only for twenty-one years; and also because no evidence was given of the number of persons composing the Corporation. The learned Judge reserved the several points, directing a verdict for the lessor of the plaintiff, which was found accordingly. There were two other objections made, but they were not alluded to in the argument.

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A rule *nisi* having been obtained in pursuance of the leave reserved at the trial—

*Fitzgibbon* appeared to show cause against this order, but the Court called on—

*Radcliffe* and *James Robinson*, in support of the order.

This lease is void, because purporting to be made by an Ecclesiastical Corporation, it is not made under the seal of the Corporation: *Kyd. on Corporations*, p. 267. This being a Corporation aggregate the lease is void *ab initio*; it is otherwise in the case of a Corporation sole, where such a lease can only be avoided by the successor. If therefore it be void as a lease made by a Corporation aggregate, not under their seal, it cannot be received in evidence. The plaintiff should have proved the seal affixed to be the common seal of the Corporation. Mere possession is not sufficient, the plaintiff must recover on the strength of his own title: *Allen v. Rivington* (a); *Doe v. Barber* (b); *Doe d. Hughes v. Dyeball* (c). Is this then the case of an apparent tortious possession? The 3 & 4 *Vic.* c. 108, s. 149, recognised the “body corporate, called the Warden and Vicars Choral of the Royal College or Collegiate Church of Galway;” but independently of that statutable recognition, it appears on the face of this lease that it is a corporate instrument; and nothing appearing to the contrary, the Court are bound to presume this body is a corporate body, and the lease a corporate instrument:

(a) 2 *Saund.* 110, a.

(b) 2 *T. R.* 749.

(c) *M. & Mal.* 347, note.

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*Davenport* (a); *Cooch v. Goodman* (b).—[BLACKBURN, C. J. No doubt they are a body corporate.]—Then this lease is void *quâ* lease, and the plaintiff must show some resolution under the common seal authorising the grant: *The Mayor, &c., of Ludlow v. Charlton* (c); *Harper v. Charlesworth* (d).—[PERRIN, J. There is a case reported in *Perkins on Conveyancing*, p. 27, in reference to a common seal.]

*Roger C. Walker*, who was with *Fitzgibbon*, in reply.

This lease is good against the persons who made it. There are two statutes affecting this question; first, 10 & 11 *Car.* 1, c. 2; and secondly, the statute 10 & 11 *Car.* 1, c. 3: *Co. Litt.* 42 b; 4 *Bac. Abr. Lease*, E.—[BLACKBURN, C. J. In *Robinson v. Wynne* (e), the authorities on this point are all reviewed, and it is decided that such a lease is good against the grantor, but void against his successor.]—It is then objected that there was no evidence that the lease was made under the corporate seal; if the Corporation had no common seal and they adopted a seal which was proved to have been impressed upon the instrument, that would be sufficient. Then it is said we cannot maintain our ejectment by evidence of a perception of rents from year to year taken under this instrument.—[CRAMPTON, J. If your former point be good, that does not arise.]—*Wood v. Tate* (f). We say there was evidence to go to the jury that the Corporation adopted this seal as their common seal; and the lease purporting on the face of it to be made by the whole Corporation, is evidence that it was their deed. The warden was produced at the trial and swore he was warden, and the rest were the vicars.

BLACKBURN, C. J.

This was an ejectment on the title, brought by the lessors of the plaintiff against the Galway Town Commissioners. It would have been more satisfactory to have had the report of the learned Judge

(a) 1 Wils. 184.

(c) 6 M. & W. 815.

(e) Hayes' Rep. 336.

(b) 2 Q. B. Rep. 580.

(d) 4 B. & C. 574.

(f) 2 New Rep. 247.

instead of his adoption of the certificate of Counsel; and if we thought any difficulty existed as to the facts on which our judgment is to be founded, we would allow the case to stand over. The want of such a report has, in this case, caused some difference and controversy at the Bar, and for the future we wish it to be understood that we desire to have a full note of the evidence given at the trial.

The title of the plaintiff is under a lease, bearing date the 15th of May 1845, of premises in the county of the town of Galway, which professes to be made by the head and subordinate members of this Corporation, who signed it *simul et semel*. It was admitted, that if these persons constituted the entire body corporate, and were present at the time of its execution, there would be no valid ground of objection to the lease; but it has been contended that, inasmuch as it did not appear in evidence that the persons who signed this instrument were the sole members of the body, it was invalid. It is to be observed that no question was raised at the trial, nor was any evidence offered to show that these were not the persons of whom the body was constituted; they are named in the deed, and described to be the warden and vicars of the town of Galway, which is the corporate name, and as no other persons are proved to be members of it, we must presume that they are what they have described themselves. This is their joint act, dealing with the property of the Corporation; besides, the plaintiff has been proved to have obtained possession of the property, and to have paid the rent to this corporate body from the date of the lease to the present time, yet it is argued that we ought to presume that the body consisted of other members. We cannot make any such presumption; it would be contrary to the evidence in the case, which on the whole warrants a totally opposite presumption. If indeed the presumption was not such as I state, it was open to the defendants to have shown by the cross-examination of the plaintiff's witnesses (one of whom was the head of this body), or otherwise, who were really its component members.

Then as to the objection to the seal. Whether they had a corporate seal, or whether this was in fact their common seal or not, is a matter of no consequence; for the body being assembled, have *pro*

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*hâc vice* used and adopted the seal as their common seal; and the authority of *Perkins* is conclusive upon that point. He says (in p. 27):—"If abbot and convent seal a writing with the seal of a lay-man, and it is said in the deed '*in cujus rei testimonium appensum est nostrum sigillum commune,*' and the writing is delivered according to the form of law, it is a sufficient deed, and shall bind the abbot and convent, for the seal shall be called their 'convent or common seal' for the time; for with their common assent they may change their common seal at whatever time they will." If we read the words "warden and vicars" for the words "abbot and convent," that authority will appear to conclude the case, as all the members of the body were present when the seal was affixed to the deed.

It was argued, that this being a demise by an Ecclesiastical Corporation for a term of forty years, was void; but as the premises are admittedly in the town of Galway, *prima facie* there is no objection to that lease, for such a body may demise premises so situated for such a term; if it were invalid in consequence of other premises outside the town of Galway being included in the demise, that fact ought to have been proved, and the objection, if any, would be a different one from that which was raised at the Bar.

BURTON, J., concurred.

CRAMPTON, J.

I felt at first some difficulty as to the admissibility in evidence of the lease under which the plaintiff in this case makes title; but I am now satisfied that it was properly received in evidence.

The plaintiff makes title by a lease under the warden and vicars of the town of Galway. The warden and vicars are a Corporation, and can pass an estate only by an instrument under seal. The seal affixed to the lease in question is confessedly not the common seal of that Corporation; but they may have sealed the instrument notwithstanding. There are two modes of sealing corporate instruments: first, it may be shown that the instrument was sealed by the Corporation with their common seal; and that is the ordinary mode

by which a deed passing corporate property is established in proof; but secondly, there is another mode, which is that referred to by *Perkins*; and it is this, that where the corporate body has not a common seal, or where they choose to adopt the seal of an individual, they may make the private seal their seal for the occasion, and thereby pass the estate as effectually as if the deed was sealed with their common seal.

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But then it must be shown that the use of the adopted seal was the act of the Corporation itself. The seal to the lease in question is confessedly not the common seal of the Corporation, nor does it appear whether or not they have a common seal. The question then is, have we upon the Judge's report evidence that the use of the seal in question was the act of the corporate body? We have no direct evidence that the Corporation consisted only of the persons whose names are recited as being vicars, &c., and as being, with the warden, the granting party. The lease itself does not state that the corporate body were composed of the persons therein mentioned; but the expression "their seal" is used.

There is also proof of payment of rent out of the premises in question to the plaintiff as tenant to the corporate body, and of receipts from him as lessee of the Corporation. These circumstances are such as would tend to show that this lease was executed by the Corporation. The plaintiff might have confirmed his case by producing the charter of incorporation, or have proved that there were no other members of the corporate body than the warden and vicars named in the lease. On the other hand, it was open to the defendants to show (if they could) the charter also, or to prove that there were other members besides those named in the lease, and that those other members were not parties to the execution of the lease; and such evidence would, I think, have been sufficient under the circumstances to defeat the plaintiff. But no such evidence was offered. Considering therefore that there was some evidence that the lease was an act of the Corporation, and that there was none offered to countervail the plaintiff's case, and considering the manner in which the objection has been taken at the trial, I think the verdict should not be disturbed.

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The defendants' second objection assumes that corporate property can be passed only under the common seal of the Corporation. Now, that assumption we have seen is not founded in law. The cause shown therefore should be allowed.

PERRIN, J., concurred.

Cause allowed.

### GILMAN v. CHUTE and others.

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To a *scire facias* defendant pleaded that a present right to receive the money secured by the judgment accrued to the connusee more than twenty years before the suing out the writ; the plaintiff replied that the judgment was obtained on a *post obit* bond, traversing that a present right to recover the money secured by the judgment accrued more than twenty years before the suing out the writ; on this, issue in fact was taken.

*Held*, that the production of a bond, agreeing in all respects with that on which the judgment had been entered, was *prima facie* evidence that it was the same bond as that on which the judgment had been entered.

*Held also*, that the condition of the bond being given in evidence, it did not contradict the record, and was properly admissible to show that the bar created by the Statute of Limitations did not arise.

*Held also*, that the defendant having taken issue on the fact, could not aver the record precluded enquiry.

SCIRE FACIAS, tried before JACKSON, J., at the Summer Assizes of 1847, for the county of Kerry.

The writ recited a judgment recovered by Catherine Morris in Easter Term (59 G. 3, 1819,) against James William Raymond, as well of a certain debt of £600 late currency, by the acknowledgment of the said James William Raymond, as £2. 13s. 10d. which were adjudged to the said Catherine Morris as damages. The writ then stated the death of the original parties, and that the parties on the record became their representatives, and concluded in the usual form, praying execution on the judgment.

The defendants pleaded that a present right to receive the money secured by the judgment accrued to Catherine Morris more than twenty years before the commencement of the action or suit of *scire facias*, and that at the time the right to recover the money secured by the judgment accrued to Catherine Morris, and from thence until her death, she was a person capable of giving a discharge for or a release of the same, and that no part of the principal money secured by the judgment, or any interest thereon, was paid, nor was any

acknowledgment given within twenty years before the issuing of the writ of *scire facias*. M. T. 1847.  
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The plaintiffs replied that J. W. Raymond, on the 5th of April 1819, by his bond or writing obligatory, acknowledged himself indebted to Catherine Morris in the sum of £600, conditioned for the payment of £300 to Catherine Morris, her executors, administrators and assigns, on the day of the decease of Catherine Morris, and that this was the same bond mentioned in the record of the judgment; that Catherine Morris died within twenty years before the commencement of the present action, to wit, on the 1st of May 1836, and that thereupon a present right to recover the money secured by the judgment accrued to her executors; *Absque hoc*, that a present right to recover the moneys secured by the judgment accrued more than twenty years before the commencement of the action or suit; and concluded with *profert* of the bond, the condition whereof was, that if the said James William Raymond, his heirs, executors, administrators or assigns, should well and truly pay, or cause to be paid, unto the said Catherine Morris, her executors, administrators or assigns, the just and full sum of £300 of the then currency of Ireland, on the day of the decease of the said Catherine Morris, with legal interest from the date thereof, without fraud or further delay, that then the said obligation should be void and of none effect, or else should stand and remain in full force and virtue in law.

The defendants rejoined, taking issue on the averment that a present right to receive the moneys secured by the judgment accrued to Catherine Morris more than twenty years before the commencement of the said action or suit.

The plaintiffs at the trial gave in evidence an attested and compared copy of the judgment on which the *scire facias* issued, and it appeared to be a judgment entered up in the ordinary way on a bond payable *in presenti*, and contained no stay of execution. They also offered in evidence a bond, which it was admitted was signed by J. W. Raymond, and by which he became liable to pay £600, with condition for the payment of £300 to the executors and administrators of Catherine Morris on the day of her death.

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This bond was objected to by the Counsel for the defendants, but was admitted subject to the objection.

The death of Catherine Morris was admitted.

A witness was then called on behalf of the plaintiffs, to prove that the judgment was entered on the bond which was given in evidence; but the witness not appearing, the Judge expressed his opinion that it was admitted on the pleadings, and thereupon the plaintiffs closed their case.

The defendants' Counsel then called for a nonsuit, on the ground that it appeared the judgment in question was payable immediately upon the rendition thereof, and consequently barred by the Statute of Limitations; this the Judge refused: they then submitted that there was no evidence that the bond which had been proved was the bond on which the judgment was entered, and that if the jury were of opinion that it was not the bond mentioned in the judgment, they ought to find for the defendants; but the Judge declined to leave that question to the jury, and left the case to them on the terms of the issue joined: they found for the plaintiffs.

An order *nisi* having been obtained for liberty to enter judgment for the defendants *non obstante veredicto*, or that the verdict be set aside and a new trial granted—

*G. Bennett and Leslie*, showed cause.

The evidence was properly admitted to show, as a matter of fact, when the Statute of Limitations began to run. On a *post obit* bond the statute does not begin to run until the right to receive the money secured by the judgment accrues; that is, on the death of the party, when the bond is made payable: *Barber v. Shore (a)*

*Thomas Fitzgerald and Jeffcott*, contra.

The judgment on which the *scire facias* issued having been given in evidence, it was not competent for the plaintiff to offer evidence contradicting that record; he was estopped by that judgment; the plea therefore appearing clearly on the face of the record to be an answer to this *scire facias*, the defendant is entitled to have

(a) 1 J. & Sy. 610.

judgment entered for him *non obstante veredicto*.\* We do not, however, press this branch of the motion; for we are clearly entitled to a new trial, on the ground of the admission of illegal evidence.—[BLACKBURNE, C. J. The question is, whether the statute has not opened the matter of fact to be enquired into exclusive of the judgment?—Upon the pleadings, it must be assumed, the bond was a single bond; and it is a departure to say in the replication that it was a *post obit*.—[CRAMPTON, J. I see no more inconsistency in stating this was a *post obit* bond, than if it was a statement of *cesset executio*, which the plaintiff might reply, although no part of the record.]—The only evidence admissible was the record of the judgment: 2 *Stark. Ev.* p. 705, 2nd ed.

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The replication would be bad on demurrer: *Tuckey v. Hawkins* (a); and as the issue has been improperly knit, we are entitled to a new trial. The defendant can plead nothing in bar to the *scire facias* which he could not have pleaded to the original action: *Cook v. Jones* (b); *Edmunds v. Groves* (c); *Bradley v. Urquhart* (d).

*Leslie*, in reply.

As to the evidence; they do not complain that the identity of the bond was not left to the jury; and as there was *prima facie* evidence, the Judge could not nonsuit, as asked to do.

As to the replication; if it be not good, there is no other mode of evading the bar caused by the statute.—[PERRIN, J. The difficulty is, that you cannot go beyond the judgment. There is a judgment entered in 59 G. 3, 1819, affecting the lands of the conusor, and yet there is no right to enforce that judgment until the death of the

(a) 11 Jur. 910.

(b) Cowp. 727.

(c) 2 M. & W. 642.

(d) Ibid 456.

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\* A defendant cannot move for judgment *non obstante veredicto*; the proper course for him, where the facts appear on the record, is to move in arrest of judgment: vide *Keenan v. Phillips* (5 Ir. Law Rep. 440), and *M'Creery v. Jackson* (Ibid. 443). In *Rond v. Vaughan* (1 Bing. N. C. 767), Tyndal, C. J., says:—"We are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favour *non obstante*."

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conusee. This affects the rights of judgment creditors. This judgment is forty years old, and no payment or acknowledgment made; would not the allowing the replication be introducing a new exception? The plaintiff can be under no difficulty, for he could sue on the bond.]—If we sued upon the bond they would plead that it was merged in the judgment.—[PERRIN, J. No; for that is a judgment upon an absolute bond.—CRAMPTON, J. "Writing obligatory" are the words used; that may be with a condition or without one.—PERRIN, J. Suppose when the action was brought on the bond, the defendant had pleaded that the bond was on a certain condition, namely, to pay a certain sum of money on the death of the plaintiff, she being still alive, could judgment then be entered? ]—No, for the condition of the bond would be a bar to the entry of the judgment then.—[PERRIN, J. You assume too much. It is a condition making it uncertain whether the money be due or not until the time arrive.]—The penal sum was due at the time of the execution of the bond, and the condition is a contract not to enforce that bond for a certain time. But then it is said that we are estopped, upon the principle that we cannot contradict the record. We do not. The sum "received" by the judgment is not the penal sum in the judgment. In *Mahon v. Davoren (a)*, on a *scire facias*, evidence was allowed, in order to take the case out of the statute 8 G. 1, c. 4, to show that two judgments had been originally entered upon a joint and several bond, and proceedings had been taken upon foot of one of them; and it was held that the Judge was right in leaving the question to the jury, to say whether such a bond existed. *Warrens v. O'Shea (b)* also takes the distinction. A *cesset executio* would be different from the present case, for that applies to the equitable jurisdiction of the Court, and is no part of the judgment. Besides, the Statute of Limitations only applies to realty; there is nothing in it to bar an execution against personal property. It may be said that statute repeals 8 G. 1; but it would not therefore necessarily follow that the 3 & 4 W. 4, c. 27, applies to personalty.

*Cur. ad. vult.*

(a) 2 H. & Br. 522.

(b) 5 L. R. N. S. 77; S. C. 1 J. & Sy. 504.

BLACKBURN, C. J.

This is a *scire facias* to revive a judgment for £600 obtained in 1819, in an action of debt on bond, to which the defendant filed a plea of confession.

The plea is founded on the 40th section of 3 & 4 W. 4, c. 27, that a present right to receive the money secured by the judgment accrued more than twenty years before suing out the writ. The plaintiffs' replication states that the judgment was obtained on a bond for £600, to which there was a condition making it void on payment of £300 on the death of the obligee; and that the obligee died in 1836; and it traverses that the right to receive the money secured accrued more than twenty years before the suing out of the writ of *scire facias*.

On this issue is taken, and on the trial of this matter of fact the bond was given and received in evidence. To its admissibility there were two objections; first, that there was no evidence that the bond was the same as that on which the judgment was obtained. I think there was *prima facie* evidence that it was; it was of the same date, between the same parties, and for the same sum as that declared on. Until evidence was shown to the contrary, the Judge was warranted, not in directing the jury to find it was the same, but that the jury should presume it was: the difference is, in truth, but nominal, there being no evidence to encounter the presumption; and we cannot do any thing so nugatory as to send the case down to be tried again, for there is no suggestion that the fact is otherwise than the jury have found it. The learned Judge was required on this ground to direct a nonsuit or verdict for the defendant: he certainly could not have done either; and although we think he was mistaken in thinking that the identity of the bond, which was stated as inducement to the traverse in the replication was thereby admitted, still when there was *alimunde* uncontradicted evidence of the fact, we could not advance any just object by setting aside the verdict.

The second point is that the bond was not admissible, as it contradicted the judgment: the judgment repeated the words of the bond, is an acknowledgment of a present debt, and awards its immediate recovery; the condition of the bond is however that it shall

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not be immediately paid, but at a future time and on a future event. If this evidence was not admissible, there can be no case in which the use of a judgment absolute in its terms can be controlled by any collateral agreement; and yet in whatever terms a judgment may be obtained, it is perfectly competent to the parties to it to make the use of that judgment the subject of a collateral contract, though they stipulate for and create what is *debitum in presenti*; they may agree that it shall be satisfied by the payment of a lesser sum, or that it shall be payable at a future time, or on a contingent event: a contract for any of these purposes may be made before the judgment is obtained, or be contemporaneous with or subsequent to its recovery.

The statute 3 & 4 W. 4, c. 27, appears to have reference to such a state of things, and to oblige us, without any regard to the doctrine of estoppel, or to the absolute form of the judgment, to enquire at what time, in fact, a present right to receive the money secured by it accrued to some person capable of giving a discharge or release for the same. If the judgment was to be invariably the *terminus a quo*, it would in every case fix conclusively the date of the right, the amount to be recovered, and the person capable of giving a release; for each of them must always be evidenced by the record: but my opinion is that this was not intended; on the contrary, that the Act sanctions enquiry *dehors* the record, and means to provide for and deal with the substance and not the form of the transaction in the course of which the judgment has been obtained or confessed, and in which by the mutual agreement of the parties it is to be controlled or modified so as to effectuate their mutual rights and obligations. This construction appears to me to be confirmed by the circumstance that this limitation of the right to recover extends to and comprises demands secured by mortgage, lien or otherwise charged on land, as well as by judgment. It would be difficult to hold that in those cases, namely, cases of mortgage, liens and other charges, the time when the right to receive the debt was to be enquired into as a matter of fact, and that no such enquiry should be allowed in the cases of judgments, though included in the same clause and requiring in reason the application of the same remedy.

This is the opinion I have formed on the construction of the statute. But even if I were wrong, I should say that the defendants taking the course they have adopted in pleading, and taking issue on the fact, ought not to be allowed to aver that the record precludes enquiry.

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BURTON, J., concurred.

CRAMPTON, J.

I concur in thinking that the cause shown ought to be allowed. The conditional order was that judgment should be entered *non obstante veredicto*, or that the verdict should be set aside, for the reasons appearing upon the certificate, namely, that there was no evidence to go to the jury of the identity of the bond; secondly, that the bond should not be read for the purpose of contradicting the record.

As to the judgment *non obstante veredicto*, that point was not pressed, I therefore pass it by.

As to the other question. The bond produced agreed in all respects with the judgment, it was therefore *primâ facie* evidence that it was the same bond on which judgment was had, no other being produced; it was only *primâ facie* evidence certainly, but if not rebutted by other evidence it is conclusive; the Judge therefore was right in receiving it as such *primâ facie* evidence for the purpose offered.

But then did it contradict the record? At Common Law, before the 8 G. 1, if a *scire facias* issued on a judgment, and the twenty years had elapsed from its entry, a plea of payment was open to the party, and upon that plea a presumption might be raised from the lapse of time, or other circumstances, that the money had been paid. But then the 8 G. 1 was passed, which enacts, that where no suit has been prosecuted for the recovery of the debt, nor any interest or other sum or sums of money paid or received, or other satisfaction made on account thereof for the space of twenty years, a plea of payment shall be allowed as an effectual bar to such action. On that plea I think the plaintiff would be entitled to give this

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evidence. The statute uses the words "any debt or duty due and payable for the space of twenty years." Upon that the question would arise, when was the money due or payable? and that would lead to the bond upon which the judgment was entered. The time when the judgment is payable is the time mentioned in the condition of the bond, which in a *post obit* bond can only be on the death of the party. I therefore think that under 8 G. 1, it was open to the plaintiff to show by the production of the bond that the day of payment had not arrived until a period short of twenty years. The statute of 6 & 7 W. 4 adopts the language of the 8 G. 1; it speaks of money secured by mortgage, judgments, &c., and that no action shall be brought but within twenty years after a present right to receive the same. That cannot be confined to the entry of this judgment; it must then mean the period pointed out by 8 G. 1, the death of the party upon which event the money secured by the judgment becomes payable. Where then is the contradiction? The judgment is a security for a sum of money, and the only thing alleged is, that this judgment was entered upon a bond with a condition; the result is to show that a present right did not arise until the death of the party. I think there is no contradiction of the record. The cause shown ought to be allowed.

PERRIN, J.

I think the cause shown ought to be allowed. The plea to the *scire facias* was founded on the 40th section of 3 & 4 W. 4, c. 27. To that plea there was a replication that the judgment was obtained on a bond conditioned for the payment of £300 upon the death of Catherine Morris, and it concludes with a traverse that a present right to receive the debt accrued more than twenty years before the issuing of the writ. Instead of demurring, the defendant rejoins that a present right had accrued, thus joining issue as to a matter of fact. The case goes to trial, and the plaintiff produces the bond as set out in the replication, which is received in evidence, and as I think, properly received. The defendant himself joined issue on that fact, which he says was a material one, and he now calls upon us to set aside the verdict, upon the ground that this document was

improperly received. This application ought to be refused, for by joining issue, instead of demurring, he but added to the expenses of the proceeding.

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Several questions have been raised upon the construction of the statute, which, if the defendant had demurred, they then being on the record, might have been taken advantage of elsewhere. Upon these I have a great disinclination to express an opinion upon motion, but I concur in allowing the cause.

Cause allowed with costs.



In the Matter of

RICHARD WAUGH, . . . . . *Appellant* ;  
THE TREASURER OF THE GRAND JURY  
OF THE COUNTY OF THE CITY OF  
CORK, . . . . . *Respondent*.

Nov. 12.

THIS was an appeal against an applotment made by the Treasurer of the county of the city of Cork, of grand jury cess, leviable under presentment made by the grand jury of the said county of the city, at Spring Assizes 1846. The appeal was tried at the July Quarter Sessions for the said county of the city, when that Court confirmed the applotment, subject to the opinion of the Court of Queen's Bench on the following case :—

Richard Waugh, the appellant, has a stall in the meat market of the city of Cork, from the Corporation of that city, the owners in fee of the soil, as well as the grantees of the market by charter from the Crown, for which he pays a weekly rent or sum of money. The said market is a large building covered by a roof, and opening to the street by large doors. It was built by and at the expense of

The occupier of a stall in the market of the city of Cork, for which he pays a weekly rent to the Corporation of Cork, who are the owners in fee of the soil, and who preserve a general control over the market, is liable to be rated to grand jury cess; he occupying it by the sale of meat during the day, leaving in it at night a desk under lock and

key, and other property; and the circumstance of the servants of the Corporation shutting the outer gates in the evening, so that none but the servants of the Corporation can remain therein during the night, does not affect the occupier's liability.

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the said Corporation, and contains long passages for the approach of the public to stalls for the sale of meat, ranged alongside of the said passages, and an office for the use of the clerks or servants of the said Corporation, who are each day present in the market, and exercise a general control over it, in preventing the rules and regulations made by the Corporation for the sale of meat from being infringed.

The stall held by the appellant is one of those, and like the others, is made of timber, and fixed to and attached to the soil of the market, and enclosed on all sides, except the side facing the public passage, across which side there is placed a counter, which is also affixed and attached to the soil of the market; and outside that is a moveable table or block, on which the meat is laid out and cut up; counters such as this are not set up in other stalls, and the block and counter do not extend along the entire front of the stall, but sufficient room is left for an entrance from the passage into the stall, and in which the appellant might, if he pleased, insert a door. In the stall and attached to it, and also attached and fixed to the soil, is a desk, where the appellant keeps his papers, money, &c. This desk is generally kept by him under lock and key, and in the stall are generally kept by him barrels filled with salted meat. The appellant is in the habit of remaining every week-day from the morning to the evening in his stall, engaged in the business of selling meat, which he carries on for his own private profit. Every evening when business ceases the appellant leaves his said stall and the market, leaving however therein some of his property, as meat, the said barrels filled with meat, his knives, &c. The said servants of the Corporation then clear the market of all persons, lock the large doors opening to the street, and keep the same locked during the night, so that no persons, besides the servants of the Corporation, can enter into or remain in the said stall or any other part of the market during the night. The name of the appellant is painted in large characters over the stall, and he has the sole and exclusive use of the stall for the purposes of his business; but the hours of the general commencement of business in the morning in the market, and of ceasing from it at night, are fixed by the Corporation. The market is kept locked by the servants of the Corporation, and the appellant

is by them prevented from entering the said stall on each Sunday. The appellant leaves his meat therein and other property as aforesaid in the said stall during each night, and also each Sunday. The stall is held from the Corporation on the condition that the holder shall sell meat in it, and nothing else, subject also to the regulations aforesaid respecting the times of ingress and egress, and to several other regulations with reference to the sale of meat; on breach of any of which the holder loses his right to the use of the stall.

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If the Court shall be of opinion that the enjoyment which the appellant has of the said stall as hereinbefore described, subject to the restrictions aforesaid, is such an occupation thereof as to render him liable to be rated in respect thereof to grand jury cess for the said county of the city of Cork, within the meaning of the statutes to regulate grand jury presentments in Ireland, then the aforesaid applotment on appellant and order stand confirmed; but if the Court shall be of a contrary opinion, then the said applotment on appellant and the order of the Court of Quarter Sessions confirming the same shall be quashed.

A writ of *certiorari* having issued, directed to the Recorder of the borough of Cork and the Clerk of the Peace, to remove all the orders made by the said Recorder on the subject-matter of said appeal, also the special case, and a return being made thereto, the case was now argued by—

*O'Hea* (with whom was *Baldwin*), in support of the appeal, contended that the appellant was not liable to this rate. The 6 & 7 Vic. c. 32, s. 3, is the provision under which the applotment was made; that section authorises county treasurers to refer to the poor-rates for the purpose of assessment, and to have copies made therefrom; and accordingly, it is under the 1 & 2 Vic. c. 56, s. 63 (Poor-law Act), that it will be argued the appellant is rateable; but there is no such occupation here as is sufficient to charge the appellant with the rate: that Act makes rateable all lands, buildings and opened mines, all commons and rights of common, and all other profits to be had, received or taken out of any land; all rights of fishery, all canals, navigations and rights of navigation, and rights

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of way and other rights and easements over land, and the tolls levied in respect of such rights and easements, and all other tolls. This property is rateable, but the appellant is not the occupier; he is liable to be turned out by the owners of the market, who have the complete control over the entire building; the appellant has no control over the outer door, nor could he register from the premises as an occupier: *Duigenan's case* (a). If he disobey any of the regulations of the keepers of the market, he may be at once dispossessed.

*J. Reeves* (with whom was *J. Henn*) contra.

This question depends on the words of the Grand Jury Act. The rating clauses of that Act provide that the grand jury cess shall be apportioned off all *lands, houses and tenements*, without regard to parochial or other distinctions or divisions.

The appellant has a *tenement* in the nature of land; he pays rent, which is *prima facie* evidence of a tenancy. He has an exclusive occupation both by night and by day. Further, this is not a moveable stall; it is a fixture on the particular part of the market; the conditions on which the occupier holds it do not affect his right of occupation. He occupies it by his property remaining there, and by the occupation of a desk which the Corporation cannot remove. It is an enclosed tenement, and the superintendence of the Corporation is but a condition by which the occupier *holds*, on breach of which he may be turned out. It is clearly a case of landlord and tenant. On the precise words "*lands and tenements*" there have been frequent decisions: *The King v. Tolpuddle* (b); *Burt v. Moore* (c); *The King v. Brown* (d); *Rex v. The Baptist Mill Company* (e); *The King v. The Chelsea Water Works Company* (f); *Queen v. The Inhabitants of St. Martin in the Fields* (g); *The*

(a) *Alc. Reg. Cas.* 114.

(c) 5 T. B. 329.

(e) 1 M. & Sel. 612.

(b) 4 T. B. 671.

(d) 8 East, 526.

(f) 5 B. & Ad. 156.

(g) 3 Q. B. 204.

*King v. The Inhabitants of Caversham* (a); and the policy of the law is against an exception from rates.

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*Baldwin*, in reply.

The occupier, to be rateable, should have the free and exclusive enjoyment of the thing rated: *Wybrants v. Tallon* (b); *Phillips' case* (c). Nothing is more general than the word "tenement," but its operation is frequently cut down by the words which precede it in a statute. The soil is not purchased by the occupier, he has but a continuing license, nothing more than an easement: *Stocks v. Booth* (d).—[BLACKBURN, C. J. The possession is exclusive and for the purposes of his trade.—PERRIN, J. He could maintain trespass against a person bringing meat and hanging it in his stall.]

BLACKBURN, C. J.

We are all of opinion that this property is rateable, being in the occupation of the appellant, who appears to have an exclusive possession or tenancy in the strictest sense of the word. It is quite plain that he pays rent, and that he has uninterrupted possession and enjoyment of the stall. He occupies it by selling his goods in it by day, and leaving his property there by night; and the Corporation have no right to interfere with that actual enjoyment. The possession is exclusive, and the stalls are within the word tenements in the statute. We therefore think they are rateable.

CRAMPTON, J., concurred.

The cases decided on the Reform Act are of a different character from the present. "Tenement" embraces a wider range than "house or shop." The occupier takes the stall subject to a contract of a certain kind, just as an ordinary tenant.

PERRIN, J.

The outer gate being shut at night for the protection of the pro-

(a) 4 B. & Cross. 683.

(b) Ver. & So. 268.

(c) Alc. Reg. Cas. 20.

(d) 1 T. R. 428.

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perty of the different occupiers, and these being under the care of the Corporation, will not affect the right of the occupiers. That gives the Corporation no right to go into any of these stalls, or interfere with any property in them either by day or by night. The possession is *sui juris*, not as the servant of another; it is an exclusive possession.

### KIGHRON v. M'CULLAGH.

Nov. 16.

Where an attorney entered into a special agreement with his client that he would not seek to make him responsible for costs, but would look to the opposite party for them; *Held*, in an action for work and labour by the attorney, such agreement being proved, the attorney could not recover.

Where in *indebitatus assumpsit* money is lodged in Court generally in payment of the claim made by the plaintiff, such lodgment is not an admission of all the causes of action.

ASSUMPSIT for work and labour done by the plaintiff as an attorney for the defendant, tried before the LORD CHIEF JUSTICE at the Sittings after last Trinity Term.

Plea, the general issue.

It appeared in evidence that the action had been brought to recover three several bills of costs amounting to £45; and that the defendant had lodged in Court £10 generally to the credit of the cause. The matter substantially in dispute at the trial was in reference to one of these bills, the costs in which had been incurred in an action brought by the defendant against one James Harvey. With respect to this bill of costs, no retainer was proved, but it appeared from the evidence given by the defendant, that he had only authorised the plaintiff to take proceedings against Harvey on the terms that he the plaintiff would not hold the defendant responsible, but would look to Harvey alone for costs.

Counsel for the plaintiff called for a direction for a verdict on this bill of costs, on the ground that this was an illegal contract, and amounting to champerty. His Lordship refused to give such direction, but left the case to the jury to say whether such an agreement had been entered into, telling them at the same time that if such were entered into it was in his opinion an illegal agreement. The jury finding that such an agreement had been entered into, and the

sum which had been lodged in Court covering the sums claimed by the other bills of costs, brought in a verdict for the defendant.

A rule *nisi* having been obtained to set aside this verdict, as being against the weight of evidence and against the direction of the learned Judge—

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*Macdonogh*, with whom was *R. C. Walker*, showed cause.

This verdict was quite right. The defendant is entitled to prove in an action such as the present that the plaintiff had agreed to charge the money out of pocket, or that he promised to conduct the cause gratis: 1 *Step. N. P.*, p. 491; *Chit on Cont.*, p. 564. In an action on a bill of costs for prosecuting an action, where the defence was that the plaintiff undertook to conduct the cause gratis, it was held, that a declaration to that effect made by the plaintiff's clerk when he attended the Master to tax the costs in the former action was evidence for the defendant, as it was so nearly connected with the subject of the latter action: *Ashford v. Price* (a). But this agreement was perfectly legal: *Parker v. Harcourt* (b). That was an agreement by an attorney with a client to conduct all his suits without any charge except the fees out of pocket, in consideration of the client giving to him exclusively the drawing of his leases, and the emolument received therefrom; and no objection was taken to the legality of such an agreement.

But it may be said that by the payment of money into Court the defendant has admitted all the causes of action in the declaration; that is not so, for in *Jones v. Reade* (c) it was held on an action for an attorney's bill that the defendant might, after payment into Court, show that the work was done for the costs out of pocket, and not for an attorney's accustomed charges. The Courts have always been strict in favour of clients, and in restriction of any agreements which attorneys or solicitors might induce them to enter into for any amount of remuneration beyond the statutable fees: *Drax v Scrope* (d); *Roscoe on Evidence*, p. 257; *In re Stretton* (e).

(a) 3 Stark. 185.

(b) 5 Esp. N. P. C. 248.

(c) 5 Dowl. 216; S. C. 5 A. & E. 529.

(d) 2 B. & Ad. 581.

(e) 5 D. & L. 279.

M. T. 1847. *Fenton*, contra.

*Queen's Bench.*

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An agreement of this description will not be enforced, it would amount to champerty: *In re Masters* (a). There, an agreement by an attorney to receive one-half the proceeds of the suit carried on at the instance of the client was held to be an agreement which the Court would not sanction, it being substantially champerty: *Sayers on Costs*, p. 321. Such contract then not being binding on the client cannot be binding on the attorney; no action therefore can arise out of it, and the right of action remains for work and labour. In considering an attorney's bill, the jury may discard an item for work entirely useless. Further, there was no consideration; even if a retainer had been proved, it would not be a sufficient consideration, it being only a privilege given by the client to his attorney: *Shaw v. Arden* (b). The lodgment of £10 generally admits all causes of action: *Ravenscroft v. Wise* (c).

*R. C. Walker*, in reply.

If this agreement be illegal we cannot retain the verdict. But it does not amount to maintenance: *Vin. Abr. Maintenance*, M. 12; an attorney may present his client's cause without fees, and yet it is not maintenance.—[CRAMPTON, J. This is the case of an attorney who is to have his costs against the opposite party, and it is admitted if the attorney agree to receive one-half the debt, that will amount to maintenance. Now, here he agrees to take such costs as he can obtain from the party against whom the action is brought; that appears like maintenance.]—He had been the attorney for the defendant, and the defendant tells him, "I do not think this sum likely to be recovered, but if you choose to go on with it I will retain you, you agreeing not to charge me, but to take your chance against the opposite party." The case of *In re Masters* does not apply; that was a case in violation of the law respecting the taxation of costs. The policy of the law in all such cases is to protect the client from exorbitant demands.

(a) 4 Dow. 21.

(b) 9 Bing. 287; S. C. 1 Tidd, 333.

(c) 1 C. M. & R. 203.

BLACKBURN, C. J.

On the question raised first upon this special agreement, namely, as to the effect of the payment of money into Court, it might be, if that agreement had been specially declared on, an admission of the contract; but in general *indebitatus assumpsit*, payment of money into Court only admits the defendant's contract so far as the plaintiff may prove his right to the sum claimed.

As to the other question, it stands thus:—There was originally not a retainer of the plaintiff by the defendant, but a special contract that he would not call on the defendant to pay the costs of the proceedings. If that be a valid contract it is a plain defence, and the plaintiff cannot have a claim to move upon an implied contract: if invalid, he cannot recover upon a contract which is void by the policy of the law, or for work and labour in pursuance of that contract. The cause shown therefore must be allowed.

CRAMPTON, J.

I am by no means sure that this is not an utterly void contract; there is no express decision upon this point; the case in *Viner* does not state the particulars; but as the jury have found against the plaintiff for this small sum, I am disposed to concur in the judgment.

Cause allowed with costs.

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NOTE.—On the same day the case of *Graham v. Gardiner* was brought before the Court. It was an action on a bill of costs, and a retainer was proved. The defence relied on was an express agreement by the plaintiff to look to the result of an equity cause, in which cause it was proved the plaintiff had been decreed his costs; and Counsel called for a direction that this was an illegal agreement, which the learned Judge (Doherty, C. J.,) refused, but left the case to the jury, who found for the defendant.

An order *nisi* was obtained to set aside this verdict, for misdirection.

*Macdonogh* and *Curran* showed cause.

*Plunket* and *Martley*, contra, contended that this case was different from the preceding one, as a retainer had been proved, and that no illegal contract could vitiate this retainer; but the Court were of opinion that this made no substantial difference between the cases, and held that the verdict was right: *PERRIN, J.*, observing that Lord Kenyon had stated, that one of the first principles of the law is, that an express promise prevents the raising of an implied one; and *BLACKBURN, C. J.*, adding *ex turpi contractu non oritur actio*.

Cause allowed with costs.

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# HARVEY v. DOHERTY.

Nov. 24.

Where a plaintiff unnecessarily makes profert of an indenture, and the defendant craves oyer, the Court will not on motion set the rule for oyer aside, but will allow the declaration to be amended on payment of costs.

NORMAN, on behalf of the plaintiff, moved to set aside the rule for oyer made in this case, as being unnecessary. This is an action of covenant by the assignee of the reversion against the assignee of the lessee, and in such case profert is clearly unnecessary, and the rule for oyer is therefore needless.—[PERRIN, J. You should apply to amend your declaration by striking out the profert.]—That would be irregular. Where the deed declared on is but inducement, and not the gist of the action, profert is unnecessary: *Morris's case* (a); 1 *Saund.* 9. The averment of profert may be treated as surplusage: *Banfile v. Leigh* (b); there Lord Kenyon says, "It is not universally true that a profert must be made when the party pleading a deed derives title under it; it is not necessary when a conveyance to uses or a feoffment is pleaded." It is never necessary to make profert of a deed which is pleaded only by way of inducement: 2 *Saund.* 62, b.

*Peebles* and *Brooke*, contra, were not called on.

*Per Curiam.*

We cannot decide a special demurrer on motion. We will allow the declaration to be amended by striking out this averment, on payment of costs.

(a) 2 Salk. 497.

(b) 8 T. R. 571.

H. T. 1848.  
*Queen's Bench.*

MEMORANDUM.

MR. JUSTICE BURTON having, in the Vacation after Michaelmas Term 1847, departed this life, the Right Honorable RICHARD MOORE, Her Majesty's Attorney-General was, on the 24th of December 1847, appointed his successor; and in Hilary Term 1848, took his place as third Puisne Judge accordingly.

JAMES BRISTOW, Assignee of JAMES MAXWELL,

v.

JESSE MILLER.

Jan. 12, 15, 17.

INDEBITATUS ASSUMPSIT, brought by the assignee of James Maxwell, an insolvent, to recover the balance of an account alleged to be due, by the defendant, as surviving partner of the mercantile firm of Maxwell, Miller and Company, of New York, to the estate of the insolvent. The declaration contained a count for goods sold and delivered, the money counts, a count on an account stated and settled with the insolvent and his late partner, and an account stated and settled with the insolvent alone.

The defendant pleaded *non assumpsit* and the Statute of Limitations. The action was commenced on the 21st of November 1846, and the case was tried before Pigot, C. B., at the Summer Assizes of 1847, for the county of Antrim, and the jury found,

After the dissolution of a partnership, an account by a member of the partnership, authorised to wind up the affairs of the partnership, and signed by him in the name of the firm, furnished to a creditor of the partnership, and admitting their liability to an extent therein stated; *Held*, not sufficient evi-

dence of a new contract, so as to remove the bar created by the Statute of Limitations (9 G. 4, c. 14), and make another member of the partnership liable on foot of it.

*Held also*, that this account was at most but an acknowledgment of a debt, and not being signed by the defendant, was not sufficient evidence of a new contract within the meaning of the statute.

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*Queen's Bench.*

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under the direction of the learned Judge, a verdict for the plaintiff for £5785. 8s. 4d. The plaintiff produced as a witness the insolvent James Maxwell, and his competency being objected to by the defendant, a release was put in and proved from the witness to his assignee the plaintiff. Notwithstanding, his evidence was still objected to, but the learned Judge admitted it. He proved that the late Mathew Maxwell, his brother, carried on business at New York in partnership with the defendant from 1832 until the month of September 1838, when the partnership was dissolved. That he, the witness, resided at Belfast, and dealt with the American house, purchasing for and sending out to them manufactured goods, accepting bills drawn by them, and receiving consignments from them, and that on foot of their dealings a balance was due to him at the time of the dissolution of the partnership of Maxwell, Miller and Company. The witness further produced two accounts which he had transmitted to the New York house previous to the dissolution, on foot of the last of which a large balance appeared due to the witness, which accounts had been received by the New York house, and were not objected to. He further proved from his own books of account additional debits and credits as between him and the New York house, and that in 1838 he received a circular by post to this effect:—

“NOTICE.—The copartnership of Maxwell, Miller, & Co. was dissolved by mutual consent on the 17th instant; Mathew Maxwell is duly authorised to settle the affairs of the late firm.

“New York, September 18, 1838.”

On the other side of the paper which contained this notice was a letter in these terms, in the handwriting of Mathew Maxwell:—

“New York, 18th September 1838.

“MR. JAMES MAXWELL.

“Dear Sir,—Calling your attention to the annexed notice of the dissolution of the late firm of Maxwell, Miller & Co., I hereby authorise you to draw upon Messrs. Holford & Co., London, at four months, for nine hundred and thirty-two pounds nine shillings and six pence, which you will place to their credit.

“I am, dear sir, your obedient servant,

“M. MAXWELL.

“£932. 9s. 6d. at 9 $\frac{3}{4}$ —four months.”

At the bottom of the notice was written in the handwriting of Jesse Miller :—

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v.  
MILLER.

"I arrived here this morning, and hope to be able to leave for Belfast on Wednesday.

"JESSE MILLER.

"Liverpool, Monday Evening."

No date appeared, but the letter bore the Liverpool post-mark of the 15th of October 1838, and the Belfast post-mark of the 17th of October 1838.

The witness also stated that no settlement of accounts took place between him and the New York house at the time of the dissolution; but that after the dissolution, the accounts he produced had been furnished to him by his brother Mathew Maxwell, bearing date the 15th of December 1840, and signed by Mathew Maxwell, in the name of the late firm of Maxwell, Miller and Co. The balance that appeared due to him was in British currency £4550. 9s. 8d.; but the witness deposed that this sum did not exactly tally with his books, which showed a larger balance. He also proved that the defendant, immediately after the dissolution, came to Ireland and had since resided there; and that Mathew Maxwell remained in America, and died in New Orleans in the month of September 1842.

Evidence was given of certain remittances made by Mathew Maxwell, or by his order, to James Maxwell, by bills in London, paid by the acceptors in 1842, being within six years previous to the bringing of the present action, and a portion of which was placed by James Maxwell to the credit of Maxwell, Miller and Co.; and some letters from the American house to James Maxwell were put in and read on behalf of the plaintiff, not however bearing on the question raised at the trial.

The defendant contended that the debt was contracted more than six years before the commencement of the present action, and that the Statute of Limitations was a conclusive bar; and the plaintiff alleged that there had been payments on account; and that the accounts furnished by Mathew Maxwell in 1840, and signed by him in the name of the late firm, though after the dissolution of the

H. T. 1848. partnership, were sufficient to take the case out of the statute; and  
*Queen's Bench.* that the circular sent to James Maxwell in September 1838 was  
 BRISTOW a sufficient authority from the defendant to Mathew Maxwell to  
 v. state and settle the account, and thus to create a new cause of  
 MILLER. action.

The Counsel for the defendant called on the learned Judge to tell the jury, if they believed the evidence, they should find for the defendant on the issue joined on the Statute of Limitations, unless they believed that some payment had been made to the plaintiff or James Maxwell on foot of, or on account of, the debt of the partnership, within six years next before the action was brought. This the Judge declined to do; whereupon the defendant's Counsel further called on the Judge to tell the jury that the circular of the 18th of September 1838 did not, according to its true legal construction, authorise Mathew Maxwell to create a new liability or keep alive a former liability of the defendant in respect of the partnership debt: this he also declined to do; and they then called on him to tell the jury that Mathew Maxwell could not, according to the construction of that circular and by virtue of the same, state a settled account with James Maxwell so as to bind the defendant in respect of an alleged debt of the partnership, barred by the Statute of Limitations, and that Mathew Maxwell had no authority to make the defendant liable, on an account stated and settled as such, to a debt of the partnership. This also the learned Judge declined to do; and then the defendant's Counsel contended that he should tell the jury that the accounts stated in 1840 and signed by Mathew Maxwell were not, nor was either of them, in point of law an account stated and settled by the defendant, so as to make him liable in respect thereof on the count in the declaration on an account stated between James Maxwell and the defendant and Mathew Maxwell, or on an account stated between the defendant and James Maxwell, and that they were not such accounts in point of law as rendered the defendant liable to the present action in respect of the plea of the Statute of Limitations, or to entitle the plaintiff to a verdict on the issue knit on that statute. His Lordship ultimately told the jury that the debt in this case was

barred by the statute if nothing was done to relieve the party against the statute: that there were two exemptions; first, a written acknowledgment of the debt signed by the party sought to be charged with it; and secondly, a part payment of the debt: and that the plaintiff relied on both exemptions: that as there appeared on the evidence of James Maxwell a subsisting debt of the partners on the 15th of December 1840, if an account was then stated in reference to that debt by Mathew Maxwell by the authority of the defendant, that was in itself a debt on which a party might be sued; and that the circular, and the other evidence given in connection with it, was evidence from which a jury might infer such an authority from the defendant to Mathew Maxwell, to settle the affairs of the partnership, as included an authority to settle an account with a creditor. That the document of the 15th of December 1840, with the other evidence, was evidence of an account stated, and such as would constitute a new debt of the defendant and Mathew Maxwell. His Lordship left it to the jury to say, whether the remittances to James Maxwell made within six years were on account of the partnership debt? or if there were an account stated on foot of such debt by Mathew Maxwell with the authority of the defendant? and if so, to find for the plaintiff, otherwise to find for the defendant.

The jury having retired, the defendant's Counsel submitted that Mathew Maxwell had no authority in point of law, after the dissolution, to state and settle an account so as to create a new debt, and that the circular gave him no such authority; upon which the jury were recalled, and the circular was left to them with the evidence of its adoption by the defendant, from which the jury might infer that Mathew Maxwell having authority to settle the affairs of the firm had authority to settle the accounts; and if the accounts of 1840 were within the scope of Mathew Maxwell's authority, the Statute of Limitations did not apply, and the plaintiff was entitled to recover. The defendant's Counsel then excepted as well to the admission of the insolvent as a competent witness, as to the charge and direction of the learned Judge; the exceptions being, in substance, that Mathew Maxwell, after the dissolution of the partnership

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had no authority to state and settle an account so as to create a new debt against the defendant; that the circular of 1838 gave him no such authority, and that the construction of that circular was for the Judge, not for the jury; that the accounts signed by Mathew Maxwell in 1840 were not stated and settled accounts to create a new debt against the defendant, nor a sufficient promise in writing signed by the party to be charged, entitling the plaintiff to recover; and that the defendant was entitled to a verdict on the Statute of Limitations. The jury found for the plaintiff £5785. 8s. 4d., and they told his Lordship that they did not find that any of the payments made to James Maxwell within six years had been made on account of the partnership debt, and that they grounded their verdict solely on the settled accounts.

Leave being granted by the learned Judge to move the exceptions as points saved at the trial, with liberty to either party who should be dissatisfied with the ruling of the Court above to put the questions on the record by a bill of exceptions; and a consent having been entered into to that effect, a rule *nisi* had been on a former day granted for a new trial, or that the verdict had for the plaintiff be turned into one for the defendant, upon the points reserved.

Cause was now shown by—

*Gilmore* (with whom were *Holmes* and *R. Andrews*).

The evidence here is, that in 1832 the defendant became a partner with Mathew Maxwell, and their dealings with the insolvent James Maxwell began in 1834; that that partnership was dissolved in September 1838, and the circular announcing the dissolution then forwarded to James Maxwell. The writ in the present action was issued on the 21st of November 1846, and it was on the 15th of December 1840 that the last account was stated and settled between Mathew Maxwell and the insolvent. There was proof of payment of a bill of £150 in 1840, but a question was raised on it, whether that was paid on account of the present demand or not? For the plaintiff we contended that it was, and that that account of 1840 gave rise to a new cause of action, and was clearly within six years. Up to the settlement of that account no action could have

been maintained on a settled account: *Bard v. Bard* (a); *Rackstraw v. Imber* (b). There Gibbs, C. J., says—"An express promise is not necessary." *Trueman v. Hurst* (c); *Foster v. Allanson* (d); *Ashby v. James* (e); *Smith v. Forty* (f). We do not rely on this settled account as any thing like a new promise to take the old account out of the Statute of Limitations, but as giving rise to a new and original cause of action. From the date of that account the Statute of Limitations began to run. Then was that account settled in such a way as to bind the defendant? It was sanctioned by him, just as if he had been present at its settlement.—[CRAMPTON, J. Is not the question, whether Mathew Maxwell was an agent authorised by Miller to settle the account?—PERRIN, J. I think the question is, was that circular evidence?—We contend it was, and that it, in connection with the other evidence, was sufficient to enable the jury to infer an authority to Mathew Maxwell from the defendant to settle the account.

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*Tomb*, with whom were *Napier* and *Joy*, contra.

The Court should have put a construction on that circular, and not have left it to the jury to do so; for it must be construed without reference to any other matters: *Morrell and others v. Frith* (g).

There were no facts extrinsic to it that could aid the document; there was no authority given to Mathew Maxwell to create a new cause of action, and the Statute of Limitations had almost run when that account was stated. After a dissolution no new liability can be incurred: *Dolman v. Orchard and others* (h); *Abel v. Sutton* (i). Previous to the dissolution the whole debt had been contracted; and by 9 G. 4, c. 14 (Lord Tenterden's Act), there is an end put to all promises to take cases out of the Statute of

(a) Cro. Jac. 602.

(b) Holt, N. P. Cas. 368.

(c) 1 T. R. 40 (note.)

(d) 2 T. R. 479.

(e) 11 Mees. & Wels. 542.

(f) 4 Car. & Pay. 126.

(g) 3 Mees. & Wels. 402.

(h) 2 Car. & Pay. 104.

(i) 3 Esp. 108.

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Limitations, unless such be made and signed by the party to be charged: *Hyde and another v. Johnson* (a). There was no accounting here sufficient to raise a new consideration; no meeting between the parties; no settlement of debtor and creditor. In *Ashby v. James and Smith v. Forty*, there was a meeting between the parties.—[MOORE, J. It was the furnishing of an account, not its statement or settlement.]—In *Tarbut v. Bispham* (b), Parke, B., says:—"But I think there is no evidence of any accounting with the lunatic; if with anybody, it was with his agent or one of his family; but a lunatic is not competent to appoint an agent; there is no account stated with any person who can be treated as the representative of the lunatic."

But, supposing there was authority to sign that document, and that it bears the interpretation put on it, it does not take the case out of the statute; for the question is, as to the account stated; and Mathew Maxwell may have had authority to pay the balance, but nothing more. Then, what is the extent of his agency? *Tanner v. Smart* (c) decides the object of the Statute of Limitations; there must be an acknowledgment from which a promise to pay can be inferred; but the document is no acknowledgment within the terms of the statute, because it is not signed by the party to be charged, and therefore ought not be received in evidence. The proof here of an account stated is an admission; and before Lord Tenterden's Act an admission may have been evidence of an account stated; but now it is no longer so. The plaintiff's case is, that the statute has no bearing on it.—[MOORE, J. Suppose the defendant himself had stated the account as settled by verbal admission.]—That would not do; for that very exception in the statute, of part payment taking a debt out of its operation, shows what the object of the Act is.

Then, as to a settlement by partners: *Cripps v. Davis* (d); *Hart v. Prendergast* (e); *Wainman v. Kynman* (f). Rolfe, B., there

(a) 2 Bing. N. C. 776.

(c) 6 B. & C. 603.

(c) 14 Mees. & Wels. 741.

(b) 2 Mees. & Wels. 2.

(d) 12 Mees. & Wels. 159.

(f) 1 Exch. R. 118.

observes:—"In this case the Lord Chief Baron, in substance, H. T. 1848.  
 "directed the jury that the mere fact of part-payment was of itself *Queen's Bench.*  
 "conclusive to take the case out of the Statute of Limitations. We *BRISTOW*  
 "think that direction was undoubtedly erroneous. In order to take *v.*  
 "the case out of the statute, the circumstances must be such as to *MILLER.*  
 "warrant the jury in inferring a promise to pay:" *Cottam v. Partridge (a)*; *Clark v. Alexander (b)*; *Pott v. Clegg (c)*. All these cases show that to allow the mere admission of an account stated, which admission would not be allowed to prove a debt, would defeat the statute: *Jones v. Ryder (d)*; *Kilgour v. Finlyson (e)*.

*Holmes* in reply.

The bar of the statute was from the time that account was stated; and if so, our writ was sued out in time; at that time no item in the account was barred, for the earliest item in it was in 1835. It has been argued that it was no stated account, but that objection was not made at the trial. It is admitted that, before Lord Tenterden's Act, where a debt accrued more than six years previous, if the debtor acknowledged it, the bar of the statute did not intervene; that even an oral acknowledgment was sufficient; and it was to prevent the mischiefs arising from oral promises that that Act was passed, and to validate written promises only. Our position is, that the debt must be taken to have been contracted in 1840, and that from that period the bar of the statute runs. Then it is argued that a circular giving authority from one partner to another to wind up affairs does not imply authority to settle a debt; but the bare mention of such a proposition is absurd; but even so, the construction of the circular was for the jury, not for the Judge. The principle of partnership is plain; the partnership continues for the settlement of affairs, as far as third persons are concerned, though it be actually dissolved: *Collyer on Partnership*, pp. 226, 227; and so when that circular was sent, the partnership still subsisted for

(a) 4 Scott, N. R. 836; S. C. 4 Man. & Gr. 271.

(b) 8 Scott, N. R. 147.

(c) 16 Mees. & Wels. 321.

(d) 4 Mees. & Wels. 32.

(e) 1 H. Bl. 156.

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partnership debts.—[PERRIN, J. Suppose, instead of one of the partners being mentioned in the circular, it had been a third person indifferent, would the account be a stated and settled one?—It would, if that person had authority from the partners; for here there was evidence to go to the jury that Jesse Miller authorised his partner to sign that circular; and if we can rely on that stated account, the action is maintainable: *Brinsley v. Partridge* (a). It need not be shown what was the original debt, as it is made good by the accounting.—[PERRIN, J. I have no doubt at all as to the account stated giving a new right of action; my doubt is, whether it be a stated account as against Jesse Miller.]—*Haydon v. Williams* (b); *Ashby v. Ashby* (c); *Smith v. Forty*.

*Cur. ad vult.*

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CRAMPTON, J.,\* delivered judgment.

Jan. 17.

This is an action of assumpsit. The declaration contained the common counts for work and labour, the money counts and a count upon an account stated, on which the verdict has been taken. The defendant pleaded the general issue and the Statute of Limitations, and upon the latter plea the questions in this case arise. The plaintiff sued as assignee of one James Maxwell, an insolvent; the defendant is the surviving partner of the firm of Maxwell, Miller and Company. James Maxwell carried on business in Belfast, and the defendant Miller and one Mathew Maxwell traded under the firm of Maxwell, Miller and Company, and their establishment was at New York. Between the years 1832 and 1838, dealings to a considerable extent were carried on between James Maxwell and the American firm, and the result was, that Maxwell, Miller and Company were, in the year 1838, indebted in a large sum to James Maxwell.

In September 1838, Mathew Maxwell and Jesse Miller dissolved partnership, and upon that dissolution Mathew Maxwell was em-

(a) Hob. Rep. 88.

(b) 7 Bing. 163.

(c) 3 Moor. & P. 186.

\* The Lord Chief Justice was presiding at a Special Commission.

powered to settle the affairs of the late firm, and a circular to that effect was published; and there is clear evidence in the case that that circular, dated the 18th of September 1838, was forwarded by the defendant Miller to James Maxwell in Belfast. The next material fact is, that in December 1840, Mathew Maxwell sent by post from New Orleans to James Maxwell an account as between him and the late firm, containing both debits and credits, and striking a balance of above £5000 in favour of James Maxwell; that account is dated the 15th day of December 1840, and it is on this account the plaintiff's case rests.

Mathew Maxwell died in America, and the defendant Miller became resident in this country, and in the year 1846 James Maxwell became insolvent, and the plaintiff Bristow is his assignee. The action was commenced on the 21st of November 1846, and the last item of the plaintiff's claim bears date in 1838, and therefore the Statute of Limitations plainly covers the whole of the plaintiff's original demand. At the trial the plaintiff attempted to remove the bar of the statute in two ways—first, by proof of a part payment of the demand within six years before the action was brought; and secondly, he relied on the account of the 15th of December 1840 as 'an account stated and settled between the parties, and furnishing as such a new ground of action against the defendant. The attempt to prove part payment on account of the demand failed; the jury did not find at all upon that point, but they found a verdict on the account stated, with the sanction of my Lord Chief Baron, for the plaintiff, in the sum of £5785. 5s. 4d. That verdict was however taken subject to a point saved as to the effect of the account of the 15th December 1840. If that account was evidence to affect the defendant, the verdict is to stand, otherwise to be set aside and a new trial had.

The account of December 1840 was signed by Mathew Maxwell, in the name of the firm of Maxwell, Miller & Co., and it was contended by the plaintiff that Mathew Maxwell, either as the agent or as the partner of the defendant Miller, was authorised to sign this account in his name, and that it binds the defendant as if he had signed it with his proper hand; and the plaintiff relied upon the cases

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of *Ashby v. James*, *Rackstraw v. Imber*, *Smith v. Forty*, and *Ashby v. Ashby*. Now it is clear that had the defendant himself signed this account it would have been an acknowledgment of the demand sufficient to take the case out of the Statute of Limitations; but it is equally clear that the admission of Mathew Maxwell, whether as his former partner or as his agent, could not create a new liability in the defendant to James Maxwell. *Kilgour v. Finlayson* is a clear authority to show that after a partnership is dissolved, one of the late firm cannot by his act or admission involve his co-partner in any new legal liability; and since Lord Tenterden's Act, 9 G. 4, c. 14, the admission even of an authorised agent cannot bind his principal so as to take the case out of the Statute of Limitations. By the express terms of that statute the acknowledgment or promise to bind a party for such a purpose must be in writing, and must be signed by the party to be charged. The enactment is explicit that no signature but that of the party to be charged shall be sufficient evidence against him either of a new or of a continuing contract; so that, supposing Mathew Maxwell was authorised by the defendant to state and sign this account, still it is not by the statute sufficient evidence to affect the defendant, and I apprehend that the statute applies to the case of an acknowledgment in the shape of an account furnished, as much as to any other species of promise or acknowledgment. Every acknowledgment or promise, where there have been dealings, is at Common Law evidence of an account stated. But we must distinguish between that which is merely evidence of an account stated and an account actually stated and settled between parties, between an account furnished and an actual transaction between the parties. This distinction appears to me to rule this case. Here is an account furnished by the agent (I will take it) of the defendant, but there is nothing more; it is an act on one side only, there is no new transaction, no meeting of the parties, no settlement of accounts; in point of fact, there is a bare acknowledgment of a balance due; whereas in that case of *Ashby v. James*, and the other cases relied upon by the plaintiff, there was an actual settlement of accounts, a balance struck, an independent transaction. Lord Abinger says:—  
 “This is not an acknowledgment or promise by words only; it is a

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"transaction between the parties whereby they agree to the appropriation of items on the one side, item by item, to the satisfaction *pro tanto* of the account on the other side. The Act never intended to prevent parties from making such an appropriation."

Alderson, B., says:—"The Courts have never laid it down that an actual statement of a mutual account will not take the case out of the Statute of Limitations. They have indeed determined, that a mere parol statement of, and promise to pay an existing debt, will not have that effect; because to hold otherwise would be to repeal the statute:" and Rolfe, B., observes:—"An actual settlement of accounts is not an acknowledgment or promise by words only; it is a transaction between the parties, out of which a new consideration arises for a promise to pay the balance." The same observations apply to the case of *Rackstraw v. Imber*, and to the cases from *Car. & Payne*.

The case of *Ashby v. Ashby* was also cited for the plaintiff, and at first it appeared an authority for him; because the case was tried after Lord Tenterden's Act came into operation; and a verbal promise by the defendant was held to be sufficient evidence, on the count for an account stated, to take the case out of the statute: but first, there was no account stated and settled in that case at all; secondly, the statute of 9 G. 4 was not relied on; and thirdly, the verbal promise was held to be not evidence of a new cause of action, but evidence to avoid the Statute of Limitations; and it is clear that decision is inconsistent with that in the same book, a later case, *Towler v. Chatterton* (a). This case, therefore, is no authority. The result then is, that the account of the 15th of December 1840 is, at the most, only an acknowledgment of a debt; and not being signed by the defendant, the party to be charged, it is not sufficient evidence of a new or of a continued contract within the terms of Lord Tenterden's Act. The verdict must therefore be set aside.

PERRIN, J.

I concur in the judgment of the Court. The account in question

(a) 3 Moo. & P. 619.

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**MILLER.** was not a stated or settled account between James Maxwell and Jesse Miller. Mathew Maxwell had no authority to bind Miller, by creating a new debt or making a new contract. He had authority to liquidate the debts of the old firm, but the account furnished by him was furnished not in his capacity as partner, but in his new capacity of manager to wind up the concern. There must be a new trial.

MOORE, J., concurred.

Order absolute for a new trial without costs.

### KNOX v. GILDEA.\*

Jan. 14.

A declaration in covenant by heir-at-law entitled to the reversion in fee against surviving lessee, stated a demise on the 27th of Oc-

**COVENANT.**—The declaration stated that one Francis Knox (then deceased) being seised in his demesne as of fee of certain lands and tenements, did, in his lifetime, to wit, on the 27th day of October 1792, to wit, at, &c., by a certain indenture made between Francis Knox of the one part, and George Gildea and Thomas Gildea of the other part, to hold for three lives and the survivor of them, yielding and paying a yearly rent, and set out a covenant to pay the rent by the lessees during the term demised. It then averred that the lessees, by virtue of the demise, entered into and became seised of the said premises for the said term; that during the subsistence of said term one of the lessees died, and the other survived him; that the lessor also died, whereupon the reversion descended to the plaintiff as his son and heir; that one of the lives was still in being, and that during the continuance of the term, and whilst plaintiff was so seised of said reversion, to wit, on, &c., a large sum of money was due and owing of rent, &c.

The deed being set out on oyer, purported to be executed on the 27th of October 1792, and demised the lands to the lessees, their heirs and assigns, from the 1st day of November next, for and during the three lives therein named.

*Held*, on general demurrer, that the declaration was sufficient, and that it appearing from the declaration that the lessees became possessed under the lease of 1792, and no change of possession being averred, the inference is that the lessee still has possession of the premises, and that he was bound by the covenant to pay the rent.

*Scintilla.*—The statute 8 & 9 Vic. c. 106, has no retrospective operation.

\* *Coram* CRAMPTON, J., and PERRIN, J.

the other part, demise to the said George Gildea and Thomas Gildea certain lands (except as in said indenture was excepted), to hold for three lives and the the survivor of them, yielding and paying a yearly rent of £257. 10s., payable as therein; and that the said George Gildea and Thomas Gildea did thereby, for themselves, their heirs and assigns, covenant and agree to and with the said Francis Knox, his heirs and assigns, that they would pay the rent during the term thereby demised. It then averred that George Gildea and Thomas Gildea, on the 27th day of October, A.D. 1792, by virtue of the demise, entered into and became seised of the said premises for the said term of lives; that during the subsistence of the said term George Gildea died on the 1st of January, A.D. 1800, and the defendant survived him; that the said Francis Knox being so seised of the reversion expectant on the determination of the said demise, afterwards and during the subsistence of the said term, to wit, on the 1st of January, A.D. 1811, also died, whereupon the said reversion descended to Annesley Gore Knox as son and heir of the said Francis Knox deceased, and Annesley Gore Knox then and there became and was seised during his lifetime of the said reversion; that he being so seised, died on the 1st of May, A.D. 1835, whereby the said reversion descended to the plaintiff as his son and heir.

The declaration further stated that one of the lives in the said indenture of lease was still living, and that the term was still subsisting; that after the demise, and during the continuance of the term, and after the deaths of George Gildea, Annesley Gore Knox and Francis Knox respectively, and whilst plaintiff was so seised of said reversion, to wit, on the 1st day of May, A.D. 1847, a large sum of money, to wit, the sum of £880. 10s. 5d. of the rent became due and still was in arrear. Breach, non-payment of this sum.

The indenture being set out on oyer, it appeared to have been made on the 27th of October 1792, and purported to be a demise of the lands in question to George Gildea and Thomas Gildea and their heirs, from the 1st day of November next, for and during three lives therein named. There was a reservation to the lessor, his heirs, &c., to hunt and hawk, and a covenant by George Gildea and

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Thomas Gildea for themselves, their heirs and assigns, that they should and would, from time to time, and at all times thereafter during the term, pay the yearly rent. It did not state that it was made by way of release, nor that the lands were in the possession of George or Thomas Gildea, either by virtue of a bargain and sale or otherwise.

General demurrer to the declaration, and joinder in demurrer.

*Richard Reeves*, for the demurrer.

*Monroe v. Lord Kerry* (a) may be considered an authority in favour of this declaration; but in that case the action was brought by and against the original parties to the lease, the lessor against the lessee. The present action is instituted by the heir-at-law; besides, that case was argued on a writ of error brought after judgment by default in the Court below, and it must be presumed that the declaration in that case averred a possession by the defendant at the time of the rent becoming due. A freehold lease to commence *in futuro* is void and cannot pass except by seisin, and it cannot be argued that the lessee here is estopped from saying that it contained the actual demise it purported to grant: *Co. Lit.* p. 352, *b*; where it appears on the face of the instrument that it is void, the party putting his seal thereto is not estopped from controverting its validity. This is the doctrine with respect to records, and the same rule applies to indentures: *Doe d. of Barber v. Lawrence* (b); *Doe d. Barker v. Goldsmith* (c). In that case Bayley, J., says:—"If this had been a lease from these parties in their own names simply, without disclosing on the face of it the rights which they individually possessed, the demise by Sarah Barker the surviving lessor might have been sustained, because the lessee would in that case have been estopped from saying she was not his lessor." *Ludford v. Barber* (d).

Where the lessee is estopped from disputing the title of the lessor is in cases where the demise is between the original parties, and the

(a) 1 Bro. P. Cas. 67.

(c) 2 Cr. & Jer. 674.

(b) 4 Taunt. 23.

(d) 1 T. Rep. 90.

lessee is in possession and perception of the rents. Under the present indenture there is an entry averred, the effect of which is to make this person tenant from year to year; has then any reversion to which this covenant attached descended to the heir-at-law? *Cardwell v. Lucas* (a). If this were a lease at will it determined at the death of the lessor, and here Francis Knox is long since dead. Then the lessee is not estopped from showing the nature of the reversion under which the lessor holds: *Carvick v. Blagrove* (b); *Whitton v. Peacock* (c); *Doe d. Higginbotham v. Barton and Warburton* (d): nor can the plaintiff be aided by the words "yielding and paying;" there is nothing in the declaration to show that there was a legal seisin; an entry is averred and an allegation that they were seised, but that is deducing a legal conclusion, and in the present instance an improper one.

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*Workman and Napier, contra.*

This was a valid demise, and passed the estate to the three lessees named therein, of whom the defendant is the survivor. It is a good lease at Common Law, with livery of seisin. Livery of seisin may be made by the delivery of a lease on the land, followed by possession: *Co. Lit.* p. 48, a; so it might be made without going on the land at all: *Perkins on Conveyancing* (sect. 212); or it might be made by the lessor at his own residence: *Perkins* (sect. 215). It is said we have not pleaded the livery of seisin, but only the instrument itself: that is a mistake; for the declaration alleges, "the said Francis Knox did demise;" we thus plead the legal effect of the instrument; for "demise" includes the sealing of the lease, the delivery of the lease—every thing, in fact, that is necessary to give it effect: *Steph. on Pleading*, p. 339, 5th ed. "In pleading a "conveyance for life, with livery of seisin, the proper form is to "allege it as a demise for life; for such is its effect in proper legal "description:" *Rastall's Entries*, 647.—[CRAMPTON, J. There the demise operated *instantly*.]—We now take the lease apart from

(a) 2 Mees. & Wels. 111.

(c) 2 Bing. N. Cas. 410.

(b) 1 Brod. & Bing. 531.

(d) 11 Ad. & Ell. 311.

H. T. 1848. the *habendum*, to show it is good at Common Law: *Throckmerton v. Tracy* (a); *Marsh v. Bulteel* (b); *Aldworth v. Riordan* (c); *Rees v. Lloyd* (d). Having pleaded the legal effect of the demise, how can it be argued that setting out the deed on oyer binds us to the express words of the demise? Being thus a valid demise of a freehold estate, the doctrine of estoppel is out of the question.

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Then what is the operation of this instrument? Does it not pass a present freehold estate? The lease is good, if the livery of seisin be postponed until a future day: *Butler v. Fincher* (e); and therefore, supposing we cannot reject the words of the *habendum*, yet the demise is good: *Platt on Leases*, p. 602.

But the lease is valid without the aid of that doctrine; for in the premises there is a good demise of a present freehold estate to Gildea and heirs; and when an express estate is granted by the premises, and the *habendum* contain an opposing estate, repugnant thereto, then the Court will reject that part of the indenture: *Goodtitle d. Dodwell v. Gibbs* (f).—[PERRIN, J. How can we do that against your express pleading?—That pleading is surplusage; the deed is before the Court on oyer, and this is a general demurrer: *Paine v. Emery* (g). And as to rejecting a portion of the *habendum*, we call on the Court to reject the words "1st November:" *Doe d. Timmis v. Steele* (h).—[CRAMPTON, J. If the meaning of the instrument were to hold from 27th of October, why did you not plead in that form?—(*Workman* gave up the point.)

No question of variance can arise here, for the lease is part of the declaration, it being set out on oyer, and therefore the demurrer cannot hold: 2 *Saund.* p. 367, a.—[PERRIN, J. They say that the demise is void, and being so, the covenant grounded on it falls.]—The declaration avers an entry by the lessees, and that they became seised; then there being a covenant to pay the rent, and no allegation that the persons who entered were prevented enjoying the

(a) 1 Plowd. Rep. 149, a.

(c) 9 Ir. Law Rep. 559.

(e) 2 Bus. 302.

(g) 2 Cr. Mees. & Ros. 304.

(b) 5 B. & Ald. 507.

(d) 1 Wight. 123.

(f) 5 B. & C. 709.

(h) 4 Q. B. 663.

lands, how can they rely on the fact of the naked construction of the instrument not passing a sufficient legal estate? Privies in blood are bound by estoppel: *Fawcett v. Hall* (a). The present case differs from that of the assignee of a reversion; but estoppel operates on the heir. We contend that the word "demise" must be regarded to operate as having passed an estate by feoffment and seisin; and no reversion was necessary to maintain this action.

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There can be no difference between heir and covenantee: *Baker v. Gostling* (b).—[PERRIN, J. Does the recent Conveyancing Statute affect this case, as to deeds lying in grant as well as in livery? That statute says, "All deeds shall lie in grant;" is that statute to have a prospective operation only?—No case has been yet decided on it.

*Martley*, in reply.

That statute can only be regarded a prospective one, for it specifies the the stamp to be affixed on deeds. It does not lie on the plaintiff to say this action is founded on privity of contract, for the declaration shows it to be founded on privity of estate. If it were a demise operating *in presenti*, the word "demise" would be enough, but this instrument imports a freehold lease to commence *in futuro*. How then can the pleading be sustained? There is no averment in the declaration to suggest that livery of seisin was postponed to such a time as would have made it effectual: had the pleader alleged that afterwards, and after the delivery of the deed, possession was taken, then the word "demise" might have been sufficient; but here the plaintiff has undertaken to show he had a freehold reversion, and every thing must be presumed against the pleader. There is no sufficient averment that the estate was transferred to the plaintiff, and it is necessary for him to bring himself in privity with the lessee by showing he has the same estate.—[CRAMPTON, J. But there is no special demurrer on that ground.]—The plaintiff must show the very reversion he pleads, the rever-

(a) Alc. & N. 248 n.

(b) 4 Moo. & Sc. 539.

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*Queen's Bench.* open to us on general demurrer.

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CRAMPTON, J.

The Court is of opinion that this demurrer must be overruled.

I need not dwell upon the formal objections relied upon by the defendant's Counsel for conceding that some of them might have prevailed had they been specially assigned; the answer to them is, that the case comes before the Court upon the defendant's general demurrer to the plaintiff's declaration.

The declaration is covenant for rent, and is brought upon a lease bearing date the 27th of October 1792, made by Francis Knox to George Gildea, since deceased, and the defendant Thomas Gildea, for a term of three lives, at a yearly rent of £237. 10s., and to commence from the 1st of November following the date of the lease. The plaintiff is the heir-at-law of Francis Knox the lessor, and entitled to the reversion in fee, and the defendant is the surviving lessee named in the lease. The lease itself is set out on oyer, and a general demurrer taken to the declaration.

The main objection relied upon by the defendant is, that the legal effect of the deed of 1792 would be to create a freehold *in futuro*, which is not allowed by the rules of law; that therefore no estate passed by this lease, or at the utmost an estate for a year or an estate at will only, and that therefore the demise stated in the declaration is variant from that which appears upon the oyer.

Now I will assume that the lease of 1792 attempted to create a freehold to commence *in futuro*, and there being no livery of seisin averred, and no previous possession stated, that no freehold estate passed, upon the showing of the plaintiff; and this I take to be the fair effect of the oyer and the declaration compared. But does it follow that there is a material variance fatal to the plaintiff's action? or that no action of covenant is maintainable on the deed? I think not: it appears by the declaration that the lessee became possessed under the lease of 1792, and no change of possession being averred, the legal inference is that he still has the possession of the

demised premises. Whatever therefore be the nature of the estate or interest which the lessee took or has under the lease of 1792, the covenant to pay the rent is still binding on him; and the benefit of that covenant has descended upon plaintiff as the heir and reversioner of Francis Knox the lessor. However inaccurate the description of the plaintiff's reversion, or of the defendant's interest in the demised premises may be, the plaintiff claiming by privity of contract as heir of the lessor is entitled to the rent and to the benefit of the defendant's covenant in respect thereto.

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The variance between the deed as stated in the declaration and as appearing on oyer, if any there be, is not a variance material to the present action, and therefore no foundation for this general demurrer: 2 *Williams' Saund.* p. 367, note a, and *Ross v. Parker* (a): for whether the defendant had an estate for a year only or an estate at will, or no estate under the lease of 1792, yet he got and has the possession, and remains bound by his covenant to pay the stipulated rent to the lessor and his heirs; and this is the decision in the case of *Monroe v. Lord Kerry*, a case which has not been ever overruled.

The late statute of the 8 & 9 *Vic. c.* 106, s. 2, might have an important bearing on this argument, could it be deemed to be retrospective in its operation. It has not been relied on by the plaintiff's Counsel, and it would seem to me, from the terms of the second section and the other sections of the Act, that such a construction was scarcely contemplated by the framers of the Act.

Upon that subject however it is unnecessary now to give an opinion.

PERRIN, J.

There was but the one objection urged, that the declaration expresses a demise of a freehold estate, to commence *in futuro*, that no estate passed, and therefore, that the covenant to pay rent under that demise is of no effect. The argument for the defendant admitted that the plaintiff might have shown livery of seisin, on

(a) 1 B. & C. 358.

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the delivery of the deed after the 1st of November 1792, then how has he pleaded? that after such a day, by deed, the lessor demised the premises for three lives, to commence next after the 27th of October. By the word "demise," every thing is inferred that is necessary to constitute an actual demise. If then he did demise by that deed, he did it after the 1st of November. I think, therefore, the demurrer is unfounded, and that the declaration is good, but if the pleading had been in a simpler form, all difficulty would have been avoided.

Demurrer overruled.\*

\* MOORE, J., was engaged as one of the Lords Commissioners in the Court of Chancery.

JOHN FOTTRILL, Secretary of the Hibernian Joint Stock  
Company,

v.

JOSEPH WILLANS.\*

Jan. 18.

By the 5 G. 4, c. 159, s. 1, the Hibernian Joint Stock Company are enabled to sue in the name of the Governor or Secretary for the time being of the Company; and by the 2nd and 3rd sections a memorial of the names of

the persons forming the Company is to be enrolled in the manner prescribed by the Act, prior to which enrolment they are not at liberty to sue. A declaration stated the plaintiff to be the Secretary of the Company, but did not aver that any such registry as required by the Act had been made.

*Held*, on demurrer, that the omission of this averment was immaterial.

\* BLACKBURN, C. J., and MOORE, J., *absentibus*.

The declaration then followed the ordinary form in assumpsit, laying the promises to the Company.

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Special demurrer, that it did not appear that the Company in the declaration mentioned did carry on, or at the time of the commencement of this suit were carrying on, or ever carried on, the trade or business of bankers in Ireland, or England, or elsewhere; and that it was not shown by what right the plaintiff sued as secretary of the said Company on their behalf; and that it was not averred that a memorial of the names of the Governor and Secretary for the time being of the said Company, or of the names of the several persons being members of the said Company, had been enrolled in manner directed by the said Act of Parliament; and that it was enacted by the said Act that until such memorial should have been enrolled no action should be brought by the said Company; that the plaintiff sued on behalf of the Hibernian Joint Stock Company, and there was no Act of Parliament authorising the plaintiff to sue on behalf of any Company of that name.

Joinder in demurrer.

*Hamilton Smythe*, with whom was *Napier*, in support of the demurrer.

The only statute under which the plaintiff can sue is the 6 G. 4, c. 42, unless there be some local and personal Act which relates to this Company. The action cannot be brought under the 6 G. 4, because the declaration does not aver the Company were carrying on business as bankers: *May v. Hodges* (a): and it should have alleged that a memorial of the names of the Governor and Secretary was enrolled in pursuance of that statute. This omission is clearly bad. *Fletcher v. Crosbie* (b) shows the declaration should aver that the Company were carrying on the trade and business of bankers. The plaintiff's right to sue cannot exist at Common Law, but must be made under some Act of Parliament.—[CRAMPTON, J. The statute is a public one, and the plaintiff's title appears from the statute. Can we not assume such memorial has been enrolled?]

(a) 5 Ir. Law Rep. 584.

(b) 9 Mees. & Wels. 252.

H. T. 1848. We say the Court cannot. *Dwarris on Statutes*, p. 520; "In an *Queen's Bench*.  
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 WILLANS. "action founded on a statute, the plaintiff ought to aver every fact  
 "necessary to inform the Court that his case is within the statute,  
 "concluding in general with an express reference to the statute."

*T. O'Brien* (with him was *J. D. Fitzgerald*), in support of the declaration.

*May v. Hodges* was decided on the Irish Banking Act, which was purposely passed to enable bankers to sue and be sued; with that statute we have nothing to do. We are proceeding under the Act 5 G. 4, c. 159, incorporating this Company; and its enabling clause does not contain any exceptions which might require the pleader to negative them: *Vavasour v. Ormro* (a); *Bac. Abrid. Statute*, L, p. 469—"No person is obliged to recite in pleading any more of the statute than the clause which makes for himself:" *Spieres v. Parker* (b); *Grand Junction Railway Company v. White* (c). The Court will imply, where the declaration states the plaintiff to be the secretary for the time being, that the terms of the statute under which he sues have been complied with: *Spiller v. Johnson* (d).

*Napier*, in reply.

The Company are enabled to sue by their public officer under this statute, but not in the first instance; for the 2nd section provides that a memorial of the names of the Governor, Secretary and Members, and of the transfer of shares, is to be enrolled in Chancery; and the 3rd section enacts that no action is to be brought until such memorial shall have been enrolled: the omission of that enrolment is therefore fatal. If under the 6 G. 4, the declaration was held bad for not averring the Company were carrying on the business of bankers in Ireland under the Act, how can the omission of so material an averment as the enrolment of the memorial not prove equally fatal?—[PERRIN, J. If it have not

(a) 6 B. & Cress. 430.

(c) 8 Mees. & Wels. 214.

(b) 1 T. Rep. 141.

(d) 6 Mees. & Wels. 570.

been enrolled it will constitute a good defence to the action.]—That is not the test, for it would apply to every condition precedent; is it necessary for us to put that forward affirmatively by plea? The *Mayor of Salford v. Ackers* (a). The whole right of action is founded on that Act of Parliament, and the plaintiff cannot sue till the memorial be enrolled.

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CRAMPTON, J.

The Court is clearly of opinion that the demurrer in this case must be overruled.

The action is brought in the name of the plaintiff, who is the Secretary of an Irish Joint Stock Company. By the Act incorporating this Company, they are enabled to sue in the name of their Secretary; by the 3rd section of the same statute, it is provided that they shall not be entitled to sue, until a memorial of the names of the persons forming the Company is enrolled in the manner prescribed by the Act.

The declaration states the plaintiff to be the Secretary of the Company; but it does not aver that any such registry or enrolment as that required by the 3rd section of the Act had been made; and the omission of that averment is the cause of demurrer specified. *May v. Hodges* was decided on a principle inapplicable to the present case; there the plaintiff sued the defendant as one of the public officers of a co-partnership for the purpose of carrying on the trade and business of bankers in Ireland; and the declaration did not aver that this co-partnership either had carried on or was carrying on the business of bankers in Ireland. A demurrer to this declaration was allowed, because the statute enabling the plaintiff to sue co-partners by their public officer required that the co-partners should be persons who were carrying on, or had carried on, the business of bankers. *May v. Hodges* is plainly, therefore, not applicable to the case now before us.

The answer to this objection is the well established rule of pleading, that where there is an exception or proviso not embodied in

(a) 16 Mees. & Wels. 85.

H. T. 1848. the enacting clause of a statute, but forming the subject of a distinct  
*Queen's Bench.* section or statute, the exception or proviso must be pleaded as  
 FOTTELL matter of defence, and need not be stated and negated by the  
 v.  
 WILLIAMS. party relying on the enacting clause: *Sanders's case* (a). This rule  
 applies equally to civil and to criminal proceedings, and appears to  
 me to govern the present case.

Two cases were, however, cited by the defendant's Counsel as  
 authorities in support of the demurrer; these were *May v. Hodges*  
 in this Court, and the case of *The Mayor of Salford v. Ackers*.  
 This case is also distinguishable from the present case. There the  
 rule laid down in 1 *Saund.* 262, was distinctly affirmed by the  
 Court; but the rule was held not to apply, because the action could  
 not accrue to the plaintiff under the Salford local statute until there  
 had been a default on the defendant's part, which default should be  
 shown on the face of the declaration. The service of the notice  
 required by the Salford Act was a condition precedent to the  
 right of action against the individual. The case before us is  
 merely the case of a subsequent proviso upon a general right  
 given by the enacting clause of the statute, and comes therefore  
 directly within the rule laid down in *Sanders's case*.

PERRIN, J., concurred.

(a) 1 *Saund.* 262.

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DALY v. ROONEY.\*

Jan. 19.

**ASSUMPSIT** on the money counts.—Plea, non-assumpsit.

This was an action brought to recover the amount of deposit (£31. 10s.) paid by plaintiff on fifteen shares allotted to him in a projected railway called the Dublin and Sandymount Atmospheric Railway Company. The defendant was one of the Provisional Committee.

The case was tried before **PERRIN, J.**, at the Summer Assizes of 1847 for the county of Wicklow; and it appeared from the evidence that a prospectus had issued by which it was proposed that the capital of the Company should be £120,000, in six thousand shares, of £20 each, and that a deposit of £2. 2s. should be paid on each share on signing the subscribers' contract and obtaining scrip; that the sum requisite to enable the subscribers to petition for their bill was lodged with the Accountant-General of the Court of Chancery; and that the petition was carried through the Standing Orders Committee; but being opposed, the bill was thrown out in the House of Commons, and measures were then adopted to wind up the affairs of the Company.

The bill of particulars furnished with the declaration was to this effect:—

|   |     |    |   |
|---|-----|----|---|
| To amount of deposit paid by plaintiff on foot of fifteen shares, allotted to him in the projected Dublin and Sandymount Railway .. | £31 | 10 | 0 |
| To amount paid for certain scrip certificates in the projected Dublin and Sandymount Railway .. .. .                                | 81  | 10 | 0 |
| To amount paid for other scrip certificates in the said projected Dublin and Sandymount Railway Company, purchased by the plaintiff | 300 | 0  | 0 |

Where a party signed the subscribers' agreement and the parliamentary contract, for a projected railway, which agreement appointed a managing committee, and gave power to the directors to declare shares forfeited if the deposits were not paid, to supply vacancies in their body, the majority to bind the residue, and empowered them to carry out the undertaking, to make contracts and agreements, to apply for an Act of Parliament, to relinquish and wind up, if necessary, the undertaking, and apply the moneys deposited in payment of the expenses to be incurred, as they should think fit, and to invest the deposits and

apply them for the undertaking; and where it appeared that some expenditure was incurred before the Committee of the House of Lords, but no evidence was given of the winding up of the affairs or of any other expenditure, the bill for this railway having been thrown out by the House of Commons:—*Held*, that a shareholder who had paid the required deposit on his shares could not recover it from one of the provisional committee in an action for money had and received.

\* **BLACKBURN, C. J.**, *absente*.

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The plaintiff gave in evidence the subscribers' agreement and the parliamentary contract. The subscribers' agreement was much in the ordinary form, appointing a managing committee, stating the amount of capital, giving a power to the Directors to declare shares forfeited if the deposits were not paid, to supply vacancies in their body, to keep a minute book, and the majority to bind the residue. It further empowered them to carry out the undertaking, to make contracts and agreements, to apply for the Act of Parliament, to relinquish and wind up if necessary the undertaking, and apply the moneys deposited in payment of the expenses to be incurred, as they should think fit, to invest the deposits and apply them for the purposes of the undertaking, and it authorised the making of calls. Evidence was also given that some expenditure was incurred before the Committee of the House of Lords; but there was no evidence of the winding up of the affairs or of any other expenditure.

The effect of the Judge's direction was, that there was no partnership until the Act of Parliament was obtained; and that the parties having subscribed the agreement given in evidence, in the belief that the amount advanced would be appropriated according to the contract, and there being a failure of consideration, they were entitled to have it refunded. A verdict was taken for the plaintiff subject to the following objections:—

First, that there was a partnership between the plaintiff and defendant under the deeds given in evidence, and that therefore the action did not lie.

Secondly, that the plaintiff should have proceeded, if at all, on the deeds.

Thirdly, that the plaintiff having sued for money had and received, and a total failure of consideration arising from the abandonment of the contract being proved, and so opened his case, it was not material whether all the moneys were expended or not; and that plaintiff could not recover (if at all) out of a supposed residue which belongs (if at all) to all the shareholders.

Fourthly, that there was no evidence of money had and received by the defendant for the use of the plaintiff.

A rule *nisi* having been obtained to set aside the verdict, and that a nonsuit be entered pursuant to leave reserved, cause was now shown by—

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*Coates*, with whom was *O'Callaghan*.

This was not a partnership, but only a projected Company; there was no community of profit and loss, and a participation of profit and loss is essential to a partnership: *Wontner v. Sharp* (a); *Walstab v. Spottiswood* (b); *Dickenson v. Valpy* (c): that case shows that there can be no partnership where a mere project is contemplated; for Parke, J., observes, p. 142:—"If a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual until all those conditions are performed. If any of the other intended partners in the meantime enter into contracts he is not bound by them, on the simple ground that he never authorised them (always supposing that he has not held himself out directly or indirectly to the party with whom the contracts are made, as having in substance given such authority.)" *Forrester v. Bell* (d); *Wyld v. Hopkins* (e). This therefore was no partnership. Then it is objected we should have proceeded on the deeds, and that the action for money had and received does not lie, because there was some expenditure.—[PERRIN, J. Expenditure may be inferred, but there was not evidence of such expenditure having absorbed the whole amount of deposits; if there had been, I would have nonsuited the plaintiff; the evidence was that some expenditure was incurred before the Committee of the House of Lords.]—The onus of proving that expenditure lay on the Directors of the Company, who were bound by the agreement to obtain the Act of Parliament: *Maguire v. Goddard* (f). This Company is not now provisionally registered; that is the fault of the Directors, and owing to their default the

(a) 11 Jur. 373; S. C. 4 C. B. 404.

(b) 15 Mees. & Wels. 501.

(c) 10 B. & C. 128.

(d) 10 Ir. Law Rep. 555.

(e) 10 Jur. 972.

(f) 2 Jebb & Sy. 455.

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project has been abandoned. Where a projected Company has never been brought into actual operation, those who have advanced money on the faith of the completion of the undertaking may maintain an action to recover it: *Kempston v. Saunders* (a). Here there has been a total failure of consideration, and therefore the plaintiff is entitled to recover his deposits.—[CRAMPTON, J. I think the serious question is as to which party is bound to show that the money was applied for the purposes for which it was subscribed.] —*Nockels v. Crosby and others* (b).

*George, and D. Lynch, contra.*

There was not a particle of evidence offered to show there was a voluntary abandonment of the bill by the promoters of the undertaking, but on the contrary, that they succeeded in carrying it through the Lords though it was thrown out in the Commons Committee. Nor was there any evidence of fraud; and therefore, this being a deed between plaintiff and defendant, among others, the action, if at all maintainable, is only so on the deed. How can the plaintiff recover as for money had and received? There is no ascertained balance or residue; he should have proceeded on the covenant in the deed: *Com. Dig. tit. Pleader, O, 3; Atty v. Parish* (c); *Case v. Roberts* (d); *Edwards v. Bates* (e); *Harvey v. Arkbold* (f); *Lloyd v. Sandilands* (g). The case of *Nockels v. Crosby*, cited on the other side, was a tontine case, and is altogether inapplicable here, because there they had used no exertion to carry out the project: and in *Wontner v. Sharp* there was evidence of gross fraud; and in *Walstab v. Spottiswood* there was no parliamentary contract or subscribers' agreement. The other cases referred to were actions by third persons against provisional committee men, not by parties to the deed of agreement. There is, however, one authority conclusive in our favour, *Garwood v. Ede* (h).

(a) 4 Bing. 5; S. C. 12 B. Moore, 44.

(b) 3 B. & Cress, 814.

(c) 1 New Rep. 104.

(d) Holt's N. P. Cas. 500.

(e) 7 Man. & Gr. 591.

(f) 3 B. & Cress, 626.

(g) Gow's N. P. Cas. 13.

(h) 11 Jur. 912; S. C. 1 Exch. 264.

*O'Callaghan* replied.

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CRAMPTON, J.

The Court is satisfied there must be a new trial. This case is not distinguishable from *Garwood v. Ede*; for the principle on which that case was decided is equally applicable to the present. Here a number of persons subscribe to make a railway from Dublin to Sandymount, and an Act of Parliament for that purpose is sought for. The plaintiff is allotted fifteen shares, on which he pays deposits and obtains scrip in return, having entered into the usual subscribers' agreement and parliamentary contract. By that agreement a power was reserved, either to relinquish the undertaking or carry it on, and if relinquished, to wind up the affairs, at the discretion of the committee. The undertaking failed, the Act of Parliament could not be procured, and thus the case is brought within *Garwood v. Ede*; which decides that, under such circumstances, the action for money had and received is not maintainable.

In the present case, the defendant never had any money in his hands for the use of the plaintiff; the plaintiff was bound to show the deposits were paid, the deeds executed, and that the purposes contemplated by the deed had been served, and that a residue remained applicable to him in the Directors' hands. I do not say that even then this action would be maintainable. But if the present action be maintainable, every shareholder who purchased shares may bring an action, and how could a Court of Law do justice among the body of shareholders? how could it decide the allocation of the funds?

I am of opinion the plaintiff has taken a verdict on grounds that are quite unsustainable.

PERRIN, J.

I concur; the action for money had and received does not lie, on the state of facts disclosed here. The money was subscribed *inter alia* for the expense of a bill, for the opposing rival bills, and for the expense of winding up the affairs of the Company, in case of a

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total abandonment of the undertaking. The undertaking has been abandoned, but there was no evidence of winding up the affairs or of the expenditure. The moneys subscribed were for defraying the expenses of the passing of the bill, if any such expenses should be incurred; there was a possibility that there might be some expenditure; and as Coltman, J., says, in *Edwards v. Bates* (p. 599), "All the costs were to be paid out of the money to be received by the defendants, before the plaintiff would have any right to the surplus:" and Cresswell, J., also observes:—"We think that the nonsuit in that case was right. Two objections were taken at the trial; first, that the action should have been brought on the deed, and not in debt upon simple contract; and secondly, that as the trusts under which the money was received by the defendants were not closed, the action for money had and received did not lie."

I was therefore wrong in the direction I gave at the trial.

Order absolute for a new trial—no costs.

Lessee COLLINS v. KNOX.\*

Jan. 14, 21.

A lease made by a Bishop, Dean or other dignitary, under the enabling and disabling statutes requires no confirmation.

The statute 10 W. 3, c. 6, s. 7, disabling

rectors, vicars, curates, incumbents or other ecclesiastical persons whatsoever from making alienations, leases, &c., of glebes for more than one year, does not apply to Bishops, Deans or other dignitaries.

EJECTMENT on the title, tried before Richards, B., at the last Summer Assizes for Mayo. There was a verdict for the defendant subject to a bill of exceptions, which now came on to be argued. The plaintiff was Dean of Killala, and the ejectment was brought by him to recover possession of the lands of Ladymore, situate in the parish of Killala, and county of Mayo. The lands were

\* BLACKBURN, C. J., *absent*.

part of the estate of the Dean of Killala, and held by him in right of his deanery. At the trial, evidence was given of the induction of Dr. Collins into the deanery in 1844, and of his acting as rector of the parish by preaching in the church and visiting the sick; that there was no deanery-house for the dean to reside in, and that after the installation of Dr. Collins he, becoming anxious to build a residence for the deanery on the lands of Ladymore, which were proved to be fit and convenient for the erection of such a residence, made a formal demand of possession on the defendant. These lands were possessed by the defendant and his ancestors by virtue of several renewed leases, and a portion of them was in the demesne of the defendant. The defendant resisted the demand, and relied on a lease of the lands of Ladymore, made to him by the former Dean of Killala, Dean Gore, which bore date the 1st of March 1842; and a deed of confirmation of this lease under the seal of the Dean and Chapter was part of the defendant's evidence. The plaintiff's Counsel objected, first, on the ground that the lease had not been duly confirmed, inasmuch as it was executed by the Dean and Chapter individually and not when they were capitularly assembled, and was therefore void; and secondly, they relied on the statute of 10 W. 3, c. 6, s. 7, as enabling the plaintiff to avoid the lease on the ground that the premises were a glebe fit and convenient to be built and improved upon for the habitation and residence of the Dean of Killala as incumbent of that parish. The learned Judge was of opinion the lease of 1842 was a good and valid lease as against the lessor of the plaintiff, and refused to tell the jury that it was void under the provisions of the statute of 10 W. 3; he also refused to leave to the jury the question whether the lands of Ladymore were glebe fit and convenient to be built on and improved for the habitation and residence of the Dean as incumbent of the parish of Killala. He directed the jury therefore to find for the defendant, who accordingly did so, and this direction the Counsel for the plaintiff excepted.

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*Workman*, with whom was *Butt*, in support of the exceptions.

The lease in question was null and void in point of law, because

H. T. 1848. it was not signed by the Dean and Chapter capitularly assembled :  
*Queen's Bench.* *Dean of Ferns's case (a).* In that case the rector and three pre-  
*Lessee*  
 COLLINS bendaries affixed their names, and the remaining part of the Chapter  
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 KNOX. signed and affixed their seals afterwards to a lease, and it was held  
 null and void on the ground that it was signed and sealed by the  
 Dean and Chapter *assensus* not *consensus*. We therefore called  
 on the learned Baron to leave the question of the lease being null  
 and void to the jury, but this he refused.

Then, by 10 *W.* 3, c. 6, s. 7, it is enacted that, "From and after  
 "the 1st of January 1698, it shall not be lawful for any rector,  
 "vicar, curate or incumbent, or other ecclesiastical person whatso-  
 "ever, having a glebe fit and convenient to be built and improved  
 "upon for the habitation and residence of him and his successors, or  
 "whereon a mansion-house is already built or shall hereafter be built,  
 "or which shall lie so near or contiguous to such house so built or  
 "to be built as to be conveniently made use of for the same, to alien,  
 "set, let or demise such glebe, or any part thereof, to any person  
 "or persons whatsoever, for any longer term or time than one year  
 "from the making thereof, in possession and not in reversion; but  
 "that all alienations, and leases, or contracts or agreements for  
 "leases of such glebes or any part thereof, for more than one year  
 "as aforesaid, shall be null and void to all intents and purposes  
 "whatsoever." We proved these lands were fit for a glebe-house,  
 and the most convenient place for the Dean to reside, and called on  
 the Judge to direct a verdict for the plaintiff if the jury so believed;  
 but his Lordship, conceiving the point a novel one, and regarding  
 the length of possession which the defendant had enjoyed, as also  
 the fact of the statute being an old one, refused to give this direction  
 either. We, however, submit we are entitled to succeed on the  
 exceptions.

*Close*, with whom was *J. Millar*, contra.

The plaintiff has not established that these lands are within the  
 protection of the statute 10 *W.* 3; the lands were never held as

(a) Sir J. Davis's Rep. 116.

glebe lands, but lands annexed to the deanery, and held only in virtue of the office of Dean, and not of Rector. These are distinct offices; and it by no means of necessity followed that the lands in possession of the Dean were glebe lands. These lands were held by the Knox family for more than half a century; and the receipts proved at the trial were for rents received out of the deanery lands of Killala.

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In 1842 a lease was made to Mr. Knox by the Dean and Chapter, and registered in the diocese according to the requirements of the statute. The 10 & 11 *Car.* 1, c. 3, empowered Bishops, Deans or dignitaries of the church, and Chapters, to make leases of lands and houses belonging to their several churches, colleges or hospitals; the dwelling-house of the Dean or dignitary, and demesne lands only excepted. By that statute they were empowered to make demises of other lands and houses for a term of twenty-one years. The lands in question were not shown to be glebe lands, but lands letten for a series of years to the Knox family, and the lease on which the defendant relied was one for twenty-one years. This leads to the other objection, that the lease was not confirmed; but it does not require confirmation unless it exceed the statutable term of twenty-one years; if it were for three lives or for more than twenty-one years, confirmation would be necessary. The 3rd section of that statute of *Charles* is to this effect:—"Provided nevertheless that it shall and may be lawful unto and for the said Archbishops, Bishops, Deans, Chapters, Archdeacons, Prebendaries and other the said dignitaries ecclesiastical and their successors, and unto the said Master and Governors and Fellows of Colleges and Hospitals and their successors, or any of them, by the license of the Lord Deputy or other Chief Governor or Governors of this Kingdom and Council of State of this Kingdom for the time being, to make leases for a longer term or time than one-and-twenty years, of any of their lands or grounds. Deans and dignitaries of the church had in themselves, without the assent of the Chapter, the power of making leases; here the Dean has affixed his seal, how then can the plaintiff set aside that lease? They have not averred by their bill of exceptions that this was such a lease as required confirmation, and

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they should not now be allowed to rely on the objection, even if a valid one; but the Chapter was duly summoned for the purpose of assent and consent, and the deed of confirmation is executed under the seal of the Dean and Chapter. The words "ecclesiastical person" in the statute mean that class previously specified, but no dignitary comes under that class. If he were Rector, the Chapter would necessarily have to sign the lease in conjunction with him.—[CRAMPTON, J. Suppose the same person were Rector and Dean, would he not be within the enactment of the statute?—These lands were held in right of the deanery; if a Rector be raised to the office of Dean he is not necessarily an incumbent; here the plaintiff only acts in the capacity of Dean, and the evidence given that he preached in the church and attended the sick was not sufficient to establish he was Rector. We therefore contend we have a valid lease under 10 & 11 *Car.* 1; then that the lands were deanery lands, and lastly, that the statute of 10 *W.* 3 does not include dignitaries. *Bac. Ab.* p. 743, tit. *Lease*:—"So where a Prebendary in a cathedral church, or an Archdeacon, made a lease for years of parcel of their possessions, to which confirmation was requisite, and this was confirmed only by the Dean and Chapter, without any confirmation of the Bishop, it was held this lease should not bind the succeeding Prebendary or Archdeacon, because the Bishop is patron and ordinary of every prebend, and may be so of an archdeaconry; and therefore to make leases by them good against their successors, the Bishop's confirmation ought likewise to be had, as well as the Dean and Chapter."

*Butt* replied.

*Cur. ad. vult.*

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CRAMPTON, J.

Jan 21.

This case comes before the Court upon a bill of exceptions. The action was an ejectment on the title brought by the Rev. Dr. Collins, Dean of Killala, to recover the possession of the lands of Ladymore, situate in the parish of Killala and county of Mayo. The premises were part of the estate of the Dean of Killala, held

by him in right of his deanery. This was admitted by the defendant, who rested his defence on a lease of the lands of Ladymore made to him by a former Dean of Killala. That lease bore date the 1st of March 1842, and was made by Dean Gore, the immediate predecessor of the plaintiff in the deanery. A deed of confirmation of this lease under the seal of the Dean and Chapter was part of the defendant's evidence also. If this lease of 1842 was a valid lease as against the lessor of the plaintiff, then the verdict was right. If this lease was not a valid lease against the lessor of the plaintiff, then the verdict was wrong, and there should be a *venire de novo*.

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The plaintiff's title as Dean accrued in 1844, and he appears to be the first Dean who was resident at Killala. It appeared in the evidence that there was no deanery-house for the Dean to reside in, and that after his installation Dean Collins became desirous to build a deanery-house upon the lands of Ladymore, and with that view he made a formal demand of the possession from the defendant. These lands had been for many years under several renewed leases in the possession of the defendant and his ancestors, and part of the lands was actually included within the demesne of the defendant.

The plaintiff rested his title to recover, notwithstanding the lease of 1842, on two grounds; first, on the ground that the defendant's lease had not been duly confirmed, and was therefore void against the successors of Dean Gore; secondly, the plaintiff relied on the statute 10 W. 3, c. 6, s. 7, as enabling him to avoid the defendant's lease, on the ground that the premises were a glebe fit and convenient to be built and improved upon for the habitation and residence of the Dean of Killala. There was evidence that a small plot in the town of Killala was also part of the Dean's estate, and that it had two houses on it, and one witness said that one of these houses had been called the deanery, or the Dean's house; but there was evidence also that this old house was not a proper place for the Dean or any gentleman to reside in.

The learned Baron was of opinion that the lease of the 1st March 1842 was a good and valid lease, and sufficiently confirmed. He

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was also of opinion that the lessor of the plaintiff was not by the provisions of the Act of *W. 3* entitled to avoid the defendant's lease and to resume the possession from the defendant, and he directed the jury accordingly. The plaintiff excepted, and his exceptions are substantially these two; first, that the lease of the 1st March 1842 was not duly confirmed, and therefore void as against the successor; and secondly, that the Judge should have told the jury that the lease of 1842 was under 10 *W. 3* void as against the plaintiff; or at least that the learned Judge should have left to the jury the question whether the lands of Ladymore were glebe fit and convenient to be built on and improved for the habitation and residence of the Dean of Killala as incumbent to the parish of Killala.

It was not doubted that the lease of 1842 was a good and valid lease according to the provisions of 10 & 11 *Car. 1*, c. 3; but the plaintiff contended that the confirmation given in evidence on the defendant's part was null and void, inasmuch as it was not a Chapter act done by the Chapter capitularly assembled, and that therefore the lease not being confirmed was void as against the plaintiff. And if the lease of 1842 required any confirmation, I should say that the objection ought to prevail, for though the deed of confirmation was made under the Chapter seal, yet it appeared upon the evidence that that seal was affixed to it by the order of the Dean alone, and that the deed was executed by the members of the Chapter separately, and in their private houses, and not in a Chapter capitularly assembled: *Gibson's Codex*, p. 744; *Dean of Ferns's case*. But the answer to this objection is, that the lease of 1842 was a valid lease to bind the successor, without any confirmation whatever. All leases made by Bishops, Deans and other ecclesiastical Corporations sole, in order to bind the successor, required by the Common Law confirmation by the proper authority, and such a confirmation is still required for Common Law grants by the same Corporations sole. But leases made under the enabling and disabling statutes in England by Bishops, Deans and other dignitaries, require no confirmation: *Coke Litt.* p. 44, *b*; *The Bishop of Hereford v. Scory (a)*.

(a) *Cro Eliz.* 874.

It is otherwise of rectors and vicars, for they are excepted out of the enabling statute. In Ireland, by the statute 10 & 11 *Car.* 1, c. 3, which incorporates the enabling and disabling statutes in England, confirmation is not required to validate a lease made according to the provisions of the statute by a Bishop, Dean, or other dignitary. This exception therefore must be overruled.

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The other exception admits the validity of the defendant's lease under the statute 10 & 11 *Car.* 1, c. 3, but claims for the succeeding Dean a right under the provisions of 10 *W.* 3, c. 6, s. 7, to avoid the lease in order to provide a fit and convenient residence for the Dean of Killala as incumbent of the parish. What the effect of this enactment might be in a case in which the incumbent was merely rector or vicar of the parish, it is unnecessary to determine; for I think it clear that the 7th section of 10 *W.* 3, c. 6, applies only to rectors, vicars, curates and other incumbents and ecclesiastical persons of the lower order of the clergy, and does not apply to Bishops, Deans or other dignitaries. First, the rule *noscitur a sociis* applies directly here; where an inferior class or classes are mentioned, followed by general words, the general words are to be understood as *ejusdem generis* with the classes enumerated; and comparing the 3rd section with the other sections, it will, I think, manifest that the Legislature did not mean to include dignitaries within the enactment of that 3rd section.

Secondly, the statutable provisions applicable to leases made by dignitaries are different from those applicable to rectors' and vicars' leases, and therefore they are not likely to be placed in the same category.

Thirdly, the reason of the enactment as applicable to rectors and vicars does not extend to dignitaries; the former are supposed to have small glebes in right of their churches; the dignitaries are supposed to be better endowed, and to have cathedral residences, and their lands are not glebe lands.

But it may be said, and has been argued, that in this case the Dean of Killala is rector and vicar of the parish of Killala, and not the less a rector because he is also Dean of the diocese. That I think is the fair effect of the evidence. I take it, that as Dean the

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rectory and vicarage of Killala, with the tithes and cure of souls, belong to the Dean. But it does not appear that the lands of Lady-more are any part of the rectorial or vicarial glebe belonging to the parish of Killala; on the contrary, the evidence is that these lands are part of the deanery lands; they are demised as such by the lease of 1842; and the parol evidence is, that they belong to the Dean in right of his deanery; they are not and cannot be glebe lands. The exception assumes that the lands are glebe lands, and part of the rectory is such. I do not say that there might not have been a question raised as to the character of the lands in question; but none such was raised, and the learned Judge was not asked by the plaintiff to put any such question to the jury. We cannot now assume that the lands in question were glebe belonging to the rectory; and yet without that assumption we cannot allow the exceptions. The exceptions must therefore be overruled.

Judgment for the defendant.

### JAMES HARBISON v. GEORGE WILCOX.

Jan. 24.

Parties may, at any time before judgment, compromise an action without the intervention of their attorney.

In this case a conditional order had been obtained that the plaintiff's attorney be at liberty to continue the proceedings in this cause, and to enter up judgment thereon for nominal damages, in order to recover against the defendant the costs of the action, including the costs of this motion, notwithstanding the compromise of the action entered into between the plaintiff and defendant.

The affidavit of the attorney, on which the rule had been granted, stated, that by the directions of the plaintiff he had issued a *capias*, and filed a declaration in Michaelmas Term against the defendant for £35. 11s. 1d.; that defendant appeared, and pleaded *non assumpsit*; that after the plea was filed, the plaintiff called upon

him and told him that the defendant was desirous of making a settlement; and that he (the deponent) stated he would be glad if such could be accomplished, but cautioned the plaintiff from compromising without his (the deponent's) knowledge: that about the 24th of November the plaintiff called on him for an account of his costs, which he furnished; and on the 1st of December he was informed for the first time by the plaintiff, that the defendant had paid him £20 for his demand, but refused to pay deponent his demand; that such payment was made collusively between the plaintiff and defendant, and without his (the deponent's) knowledge; that he then wrote to the defendant on the subject, requiring him to pay his costs; but receiving no reply, he served notice of motion on his attorney. An affidavit of the defendant in the action was filed as cause, and it denied that the defendant was at all indebted to the plaintiff; but that plaintiff being a pauper, his (the defendant's) son, without his authority, settled with the plaintiff, by giving him a sum of £25; it denied that the settlement was known to him, and denied collusion.

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There was an affidavit from the defendant's son, also denying collusion, and affirming the statement in his father's affidavit.

*J. C. Lowry* now showed cause, and referred to *Storrard v. Lord Miltown (a)*.

*T. K. Lowry*, contra, relied on *Fleury v. Earl of Meath (b)*; *Sheppard v. Sherrock (c)*; *Daniel v. Cockburne (d)*; *McClean v. Pratt (e)*. The only cases in which the Court interferes are cases of tort: *McMahon v. O'Callaghan (f)*.

PERRIN, J.

If there be no collusion between the parties to defraud the attorney, they may settle without his intervention at any time before

(a) 5 Law Rec. N. S. 24.

(c) Ibid, 93.

(e) 5 Law Rec. N. S. 296.

(b) Alc. & Nap. 88.

(d) Glas. 232.

(f) 1 Law Rec. N. S. 116.

H. T. 1848. judgment, and the attorney can only look to his own client for costs.  
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In this case the attorney was actually apprised that a settlement was going on, and his costs were demanded.

MOORE, J.

I would be very unwilling to hold as a general proposition that a plaintiff and defendant could not settle a demand without the aid or intervention of an attorney, that the moment an action is commenced their hands are to be fettered, so that without an attorney no compromise can be effected. There can be no hardship inflicted on the attorney, as he looks to his own client only for the costs.

Allow cause, with costs.

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DICKSON *v.* THOMSON.

Jan. 26. DIX applied for liberty to amend the declaration in this case by changing the form of the action from assumpsit to debt. The defendant had appeared and given a plea of confession, and in the plea it was alleged to be in assumpsit instead of debt: *Billing v. Flight (a)*.

CRAMPTON, J.\*—Take the order.

(a) 6 Taunt. 419.

\* *Solus.*

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## MOLLOY v. BROWNE.

*Jan. 27.*

BUTT, on behalf of the defendant in this case, moved that the Taxing-officer of this Court be directed to review his taxation of the plaintiff's costs in this cause, in respect of the sum of £25. 4s. therein contained, and to disallow to the plaintiff any further or greater sum than £1. 1s. on account of payment to the jury empanelled upon the trial of the issue in this case at the last Assizes of Roscommon, and that he shall be directed not to allow the plaintiff the sum of £25. 4s. in said bill of costs charged for such special jury. The affidavit to ground the motion stated that in this case, which was an action for libel, a verdict had been found for the plaintiff, with damages to the amount of one farthing; that a special jury had tried the case, and that, after the jury retired and when they returned into Court, and before they handed in their verdict, the foreman of the jury applied to the Judge to order that the jury should receive £2. 2s. as the trial had occupied a second day; that the Judge intimated he had no power to make such order, and that after the handing in of the verdict the Judge was applied to for the usual certificate that the case was a fit and proper one to be tried by a special jury, which application being resisted by the defendant's Counsel, was refused. That before the verdict both parties entered into a consent that the jury should be paid, by the party in whose favour the verdict should happen to be, the sum of £2. 2s. each, and that same should be allowed against the other party on the taxation of said costs. That the meaning of this consent was, that if either party ultimately were entitled to the costs of a special jury, the payment of £2. 2s. should not be objected to on either side, and that it never meant to incur for the defendant any liability to the costs of the special jury to which he would not otherwise be liable; and that the Taxing-officer had upon the taxation of plaintiff's costs of judgment allowed the full sum of £25. 4s.

This Court will not sanction a consent entered into at *Nisi Prius* between the attorneys of the parties to pay the jury a larger sum than they are entitled to.

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although the Judge refused to certify, and had disallowed the plaintiff all the other costs incurred by him in relation to the special jury. The plaintiff's attorney in his affidavit alleged the consent was executed at the special request of defendant's attorney, and that if it did not entitle the plaintiff to said sum of twenty-four guineas absolutely, in the event of his getting a verdict, he would not have signed the consent, and that its meaning was, that that sum should be allowed against the party against whom the verdict was.

*Butt.*

The consent does not say that the sum in dispute should be paid by the unsuccessful party. Suppose no consent had been entered into, the plaintiff must have paid the sum of £12. 12s. The object of the agreement certainly was that the jury should receive £2. 2s. each. It was entered into with the sanction of the Judge.—[CRAMPTON, J. I think it is not sanctioned by law.]—It was done in *Attorney-General v. The Primate (a)*.—[CRAMPTON, J. That order has been often complained of, and I trust it will not be again made, but it has never received the sanction of this Court.—PERRIN, J. I regret extremely such a practice has arisen.]—In the bill of costs it is the only item that is allowed for the costs of the special jury.

*Workman, contra.*

This consent was an absolute one that whatever party should get the verdict these costs should be paid them and allowed on taxation.—[CRAMPTON, J. Why did you apply to the Judge to certify?—Because we say we would have been entitled to an extra sum of £7 for the costs of the order for and of striking the special jury. All we sought was the usual train of costs consequent on a special jury.—[MOORE, J. I doubt extremely the propriety of this Court giving effect to an agreement of this nature, taking from the Judge before whom the case was tried the right to certify whether it was a fit and proper case for a special jury.]

(a) 2 Jones, 362; S. C. 5 Law Rec. N. S. 153.

CRAMPTON, J.

I regret such a practice as to jurors should ever have prevailed. An agreement is entered into between the plaintiff and defendant by their attorneys, that instead of one guinea the sum of two guineas should be given to each juror, to be taxed against the party who did not obtain the verdict. I think such a practice a most injurious one, for if jurors be allowed to consider that they can prevent a verdict, bargains may be made as to their remuneration before the trial. If we gave effect to this consent, the result would be to take out of the Judge the power to certify whether or not the case was a fitting one for a special jury. We are of opinion the officer ought to review his taxation, and not allow these twenty-four guineas. We give no costs of this motion.

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SMITH v. DARLEY.

Jan. 27.

R. W. GREENE, with whom was *W. F. Darley*, on behalf of the defendant, moved that the recognizances entered into by the defendant, together with Arthur Lee Guinness and Henry Darley, to prosecute the writ of error, which the defendant had brought to the Court of Exchequer Chamber, against the judgment of this Court, be vacated, inasmuch as that judgment has been reversed.\* The condition of the recognizance is, that if H. F. Darley (the plaintiff in error) would prosecute the writ of error with effect, or if the judgment be affirmed against him, and if he should pay the defendant all the debt, damages and costs adjudged by such judgment, and all costs to be awarded to the defendant by or under the judgment on such writ of error, or any further writ of error which may afterwards be brought in such case returnable into Parliament, then

The Court will not on motion order the recognizance of a plaintiff in error in the Exchequer Chamber, and of his sureties, to be vacated, although the judgment of this Court be reversed, while a writ of error is pending to the House of Lords.

\* See 10 Ir. Law Rep. 376.

H. T. 1848. *Queen's Bench.* the recognizance to be void.—[CRAMPTON, J. Suppose the judgment of the Exchequer Chamber be reversed, then the judgment of this Court stands; would not the recognizance then be good?—We say it is *functus officio*, its condition has been performed, we having prosecuted the writ of error with effect.—[MOORE, J. Do you apply on behalf of the sureties?—Not by our notice of motion, but by our affidavit we state they are desirous of being released from the obligation. From the latter part of the condition, it will be seen that the further writ of error is a writ of error to be prosecuted by the plaintiff, and not a writ of error to be brought by his adversary to reverse the judgment of the Exchequer Chamber, to reverse his own judgment.—[CRAMPTON, J. Suppose a *scire facias* issued on this recognizance, would you have a defence to it? We should not be called on to decide this on motion.]—It is a great hardship on the sureties that this recognizance should remain affecting their estates so long as the plaintiff in error contemplates appealing to the House of Lords; we cannot control that proceeding; and we contend that the recognizance was entered into to prosecute the writ of error to the Exchequer Chamber, which writ of error is now at an end, and there must be a new writ to enable the appellant to carry the case to the House of Lords. The writ of error has been prosecuted with effect, and that is the condition of the recognizance. To give it another construction would be to render it a security for any costs Smith might incur in the prosecution of his writ of error. The 3 *Jac. c. 8 (Eng.)* and 10 *Car. 1, sess. 3, c. 8 (Ir.)*, were passed to enable a party to supersede a writ of error, and were confined to the case of a defendant against whom judgment was obtained; and 17 & 18 *Car. 2, c. 12*, extends the provision of that Act. The plaintiff was bound to give security on suing out a writ of error, though the judgment might have imposed costs on the defendant: 2 *Tidd Prac.*, 8th ed., p. 1209; 9th ed., p. 1154; *Freeman v. Garden (a)*; *Duvergier v. Fellowes (b)*. These cases show that a plaintiff was not bound to give security. *Tilly v. Richardson (c)*; *Colebrooke v. Digges (d)*.

(a) 1 Dow. &amp; Ry. 184.

(b) 7 Bing. 463.

(c) 2 Ld. Ray. 840.

(d) 2 Stra. 527.

The Court of Exchequer Chamber in England was constituted to review the decisions of the Queen's Bench. The 40 G. 3, c. 39, is the Irish statute constituting that Court in this country. The 3rd section provides for appeals from the judgment of the Court of Exchequer Chamber to Parliament. There is nothing in it imposing on the plaintiff in error the necessity of giving bail, and accordingly Smith has not given bail. The 1 G. 4, c. 68, was the first statute that had reference to the prosecution of writs of error, and the 8th section provides:—"That no execution shall be stayed by, or by reason of, any writ of error returnable into said Court, or by any supersedeas thereon, in any case whatsoever, unless the plaintiff in error with two sufficient sureties, to be approved of by the Court in which judgment shall have been given, or by a Judge of such Court, shall be first bound by recognizance in such Court in double the sum adjudged by such judgment to be recovered thereby, to satisfy and pay, if such judgment be affirmed, all and singular the debt, damages and costs adjudged by such judgment, and all costs to be awarded by or under the judgment on such writ of error, or any further writ of error which may be afterwards brought in such case returnable into Parliament."

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The meaning of that section is, that the original plaintiff in error, if he prosecute a further writ of error, must do so without delay. But that has no reference to a former writ of error where judgment was in his favour.—[MOORE, J. You wish to add to the section the words "shall be affirmed" on that writ of error.]

CRAMPTON, J.

The Court do not think that they should try this question on motion; they cannot vacate the recognizance, which must abide the issue in the House of Lords. The application is a *quia timet* one, and must be refused with costs.

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*Queen's Bench.*

SEMPLE v. GRAY.\*

Jan. 28.

In an action brought to recover penalties for receiving usurious interest, the defendant having obtained judgment as in case of a nonsuit, is not entitled to costs.

HARRIS moved that the Taxing-officer be restrained from proceeding to tax the defendant's costs in this case as between party and party as in case of a judgment of nonsuit. This was an action where the plaintiff sued as a common informer, for the recovery of certain penalties against the defendant for receiving usurious interest on some bill transactions. The plaintiff did not proceed in the action, and the defendant having obtained judgment as in case of a nonsuit, issued a summons to tax his costs on the 20th of December. The sole question is, whether the defendant is entitled to costs? The 28 G. 3, c. 31 (*Ir.*) enacts that if a party obtain a verdict or nonsuit in the ordinary way before a jury, he is not to be entitled to his costs as against a plaintiff suing as a common informer; and it is laid down in *Hullock on Costs*, p. 15:—"In an action of debt upon any statute by a party grieved for a certain penalty, the plaintiff shall not only recover the penalty or sum given by such statute, but also his costs of suit, although no costs are annexed to the recovery by the Act of Parliament on which the action is grounded." Again, p. 213:—"It hath been shown in a former part of this treatise, that in an action on a statute by the party grieved, for a certain penalty given by such statute, costs are recoverable; because such penalty being intended as a recompense for the damage or injury which he in particular and individually sustained from the offence prohibited, if he could recover no more than that specific sum without any indemnification for his costs, it would be frequently vain and nugatory to sue, since the costs of suit might exceed the amount of the sum recovered." The present action was brought under the 5 G. 2, c. 7, s. 2, the Irish Usury Statute, and Semple the plaintiff united in himself the common informer and the party grieved. The

\* *Coram* CRAMPTON, J., and PERRIN, J.

18 *Eliz. c. 5, s. 3 (Eng.)*, may be referred to against this motion, it enacting, "that if any such informer or plaintiff as aforesaid shall willingly delay his suit, or shall discontinue, or be nonsuit in the same, or shall have the trial or matter passed against him therein by verdict or judgment of law, that then in every such case the same informer or plaintiff shall yield, satisfy and pay unto the party defendant his costs, charges and damages to be assigned by the Court in which the same suit shall be attempted," &c. But *Gabbett*, in his *Digest of the Criminal Law*, vol. 2, p. 117, lays it down that this statute and several other statutes passed in the same year are not extended to Ireland. In *Tidd's Prac.* p. 946, 9th ed., it is said the Statute of Gloucester does not extend to popular actions where the whole or part of a penalty is given by statute to a common informer: *Wilkinson v. Allott (a)*; *Creswell v. Hoghton (b)*.

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GRAY.

*Brewster and Macdonogh*, contra.

This motion is premature, as the question it raises cannot be properly mooted until final judgment be marked. If the defendant be not entitled to costs, the mere taxation of them will not injure the party, as the officer will not enter an erroneous judgment. The officer who taxes the costs is not the officer who marks the judgment, and so the motion is a *quia timet* one: if the officer mark the judgment for us, the question may be raised then on the record.—[CRAMPTON, J. The officer stands in place of the Court in taxing these costs.—PERRIN, J. It is our act, though performed under statute by the officer.]—The Court has two functions, ministerial and judicial.—[CRAMPTON, J. I doubt if this be a ministerial act.]—The statute, 28 *G. 3, c. 31*, giving judgment as in case of nonsuit, says:—"That where any issue is or shall be joined in any action or suit at law, in any of his Majesty's Courts of Record, and the plaintiff or plaintiffs shall neglect to bring such issue to be tried according to the course of such Court respectively, it shall be lawful for the Judges of the said Courts respectively, upon motion made in open Court by the defendants in such action, or

(a) *Cowp.* 366.

(b) 6 *Term Rep.* 355.

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"one of them, if there be more than one, due notice having been given thereof, to give the like judgment, and award costs in every such action or suit, as in cases of nonsuit, unless the said Court shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff or plaintiffs shall neglect to try such issue within the time so allowed, then the Court shall proceed to give judgment, and award costs to such defendant as in case of a nonsuit." The taxation of the costs is no judgment as to the right to the costs; and that statute is a remedial one: the 14 G. 2, c. 17, is the analogous English statute, and is entitled, "An Act to prevent inconveniences arising from delays of causes after issue joined:" *Doe d. Berger v. Docher (a)*. The language of that statute involves every case where issue is joined, and gives costs wherever a party would be entitled to judgment as in case of a nonsuit. A second question arises on 10 & 11 Car. 1, c. 8, which gives costs to the defendant universally in every case where, if successful on judgment, he would be entitled to them. If the plaintiff, if successful, would be entitled to costs, so is the defendant.—[CRAMPTON, J. On what statute could the plaintiff in this action, if successful, recover costs?—The declaration has been framed under the 5 G. 2, c. 7, a statute giving expressly no costs; and yet *Tyte v. Glode (b)* was a case under a statute also giving no costs, and yet plaintiff was held entitled to them.—[CRAMPTON, J. That was an action on the case.]—If the Court be of opinion the plaintiff is not entitled to his costs, then 10 & 11 Car. 1 is out of the case; but we contend that defendant is entitled to his costs.

*Per Curiam.*

We must grant this motion with costs.

(a) 6 Dow. P. C. 478.

(b) 7 Term Rep. 267.

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*Queen's Bench.*

THE QUEEN, at the prosecution of THE EARL OF LUCAN,

v.

CAVENDISH.

Jan. 28.

BURT, for the defendant, moved that in making up the record in this case the proper officer be directed to insert in the information, after the usual form that same has been brought by the coroner and attorney of our Lady the Queen, before the Queen herself, who prosecutes for our said Lady the Queen, the words "at the instance of the Right Honorable George Charles Earl of Lucan," or such other statement as will be sufficient to show that he was the private prosecutor; and that regard may be had to such amendment in adding the *similiter* by the Queen's coroner and attorney; and that in entering up judgment for the defendant on the verdict of acquittal, the officer be directed to insert the award of this Court, that the said Earl of Lucan shall pay to defendant his costs, and that he be at liberty to make up the record accordingly, and that same be taxed and ascertained by the proper officer for that purpose.

The Court will not, after a trial, alter a record so as to make it appear that a criminal information was filed at the instance of a private prosecutor, but will direct the officer to tax the costs on making up the judgment.

There had been a trial on the criminal information, to which not guilty had been pleaded, and the jury found for the defendant.— [PERRIN, J. Would not the proper course be to enter a suggestion?] We adopt the present course in analogy to the proceedings by *quo warranto*; for it is only since Lord Campbell's Act (6 & 7 Vic. c. 96), that full costs could be given to defendants acquitted on a criminal information. The 8th section of that enactment is, "That in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information, &c.; such costs so to be recovered by the defendant or prosecutor respectively to be

H. T. 1848. *Queen's Bench.* "taxed by the proper officer of the Court before which the said  
**THE QUEEN** "indictment or information is tried;" it is silent as to the mode by  
*v.* which costs are to be recovered. The old English statute of 9 *Anne*,  
**CAVENDISH.** c. 20, s. 4, gives the right of filing *quo warranto* informations,  
 requiring a relator to be named and giving judgment of costs  
 against him if unsuccessful.—[CRAMPTON, J. What power has the  
 Court to alter the information?—Under its general jurisdiction  
 over its own records. Since Lord Campbell's Act, the information  
 should have named the prosecutor; here it is filed in the name of the  
 Queen's coroner, by the leave of the Court.—[PERRIN, J. Is there  
 any objection to the entry of a suggestion on the record?]

*Napier*, with him was *S. B. Millar*, for Lord Lucan, objected to  
 any alteration being made in the information.

*Butt.*

A suggestion, properly speaking, occurs when something new has  
 happened since the beginning of the proceedings. We, at all events,  
 should carry so much of our motion as requires the officer to tax the  
 costs.—[CRAMPTON, J. Without changing the information you  
 are entitled to your costs under the statute.]—The Court has  
 judicial notice that Lord Lucan is the prosecutor, and what we seek  
 is, that his name appear on the record as such. We are about to  
 make up the judgment, which has not yet been done because the  
 costs are a part of it.

CRAMPTON, J.

The proper course will be for you to tax the costs in the first  
 instance, and then act as you may be advised. We cannot alter the  
 pleadings on record, and cannot therefore comply with that part  
 of the motion; but, without prejudice to either party, we will  
 make an order directing the officer to tax the costs.

PERRIN, J., concurred.

ORDER—It is ordered by the Court that the proper officer do

tax and ascertain the costs incurred by the defendant as **H. T. 1848.**  
 between party and party; no rule as to the remainder of **Queen's Bench.**  
 the motion, but without prejudice to such further applica- **THE QUEEN**  
 tion as defendant may be hereafter advised to make when **v.**  
**CAVENDISH.**  
 his costs have been taxed and certified.

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In consequence of this motion the following General Rule was made by the Court:—

“It is ordered, for the future, that in all informations to be filed  
 “by the coroner and attorney of this Honorable Court, that the  
 “name of the person at whose instance same has been granted be  
 “inserted therein, in the nature of a relator or prosecutor, as the  
 “case may be.”

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*Queen's Bench.*

Lessee of ANNA GARLAND

v.

CAROLINE COPE.

Jan. 25, 28.

In an ejectment on the title, brought to recover "the Dummilly estate," the will of the Bishop of Ferns, who was in possession of and residing at Dummilly-house in 1786, was given in evidence; and by that will he devised all the lands and hereditaments of which he was seised in the county of Armagh to N. A. Cope and Sarah his wife, for their joint lives, and the survivor, with remainder to their first and other sons in tail male, with remainder to their issue

female. The will also contained a power to tenants for life to create a charge not exceeding £4000. The lessor of the plaintiff was sole daughter of that marriage, and claimed under the second remainder in tail. *Held*, that evidence of the Bishop's possession of one denomination of the estate, viz., a lease of Lissheffield, and payment and receipt of rent under that lease, was admissible as evidence of possession of the whole estate by the Bishop, coupled with evidence of the receipt of rents from 1795 to the period of the death of the last tenant for life, out of the whole lands which were known as the Dummilly estate.

The power of charging was exercised in 1818 by the tenant for life; and in 1838 a younger son, not in possession, executed a deed assigning a sum of £1000, part of his portion of the £4000 charged on the estate. *Held*, that the deed of 1818 was admissible in evidence as being against the interest of the party making it; it is not merely a declaration by the tenant for life, but a substantive act done by the possessor of the estate.

*Held*, that the deed of 1838 was admissible on the same principle, as being executed by a person interested in the estate, both deeds showing the Dummilly estate was enjoyed under the limitations in the will, and therefore evidence of seisin in fee of the Bishop of the whole.

EJECTMENT on the title, tried before Pigot, C. B., at the Armagh Summer Assizes of 1847. There was but one demise, laid on the 1st day of March 1847, and the premises sought to be recovered were described as "All that and those the lands and premises of Dummilly, in the county of Armagh, and usually called the Dummilly estate, as late in the possession and enjoyment of Arthur Walter Cope, deceased, his tenants and assigns, with the appurtenances and premises thereto belonging, and therewith used and enjoyed as parcel thereof, and unto the same appertaining; all which said lands and premises are situate, lying and being in the barony of O'Neiland East and O'Neiland West, in the said county of Armagh." The defendant took defence generally. To sustain the plaintiff's case, the will of Walter Cope, Bishop of Leighlin and Ferns, and the exemplification of the probate of the will were produced; a witness was then sworn, who deposed that he held a farm in Lissheffield, containing twelve acres, which was part of the Dummilly estate; that he knew the person who held the farm before him, he was his father-in-law; that a receipt which was produced, dated

the 5th day of January 1787, for the sum of £6. 1s. 9d. he got from his sister-in-law, and also a lease dated the 14th day of March 1786. One Edward Hickey then proved that he knew Thomas M'Kane, who had been steward to Bishop Cope, and also one Michael M'Cullagh, who was clerk and own man to the Bishop, and the signature to the receipt he proved to be in M'Cullagh's handwriting, and the signature of the Bishop to the lease he also proved. The agent of the Dummilly estate was then examined, and deposed that he and his father had acted as agent for a great many years for Nicholas Archdall Cope, who married Miss Meade; that his father had received the rents from 1795; he proved several entries in the rent books, dated 1819 and 1823, being receipts of rent for Nicholas Archdall Cope, who died in 1820. He proved the value of the Dummilly estate to be £2600 per annum, exclusive of the demesne of Dummilly, and a bog adjoining worth £120 per annum. Nicholas Archdall Cope's wife's name he stated to be Sarah Arabella Abigail Cope, and that she died in 1844 or 1845. A memorial of a deed of the 22nd of April 1844 was produced and proved, and it appeared that the original was executed by one Francis Wilson Heath. The death of Arthur Walter Cope was proved to have taken place in November 1846. Attested copies of a fine levied as of Easter Term 1786, and of a recovery suffered in the same Term, were produced, and the pedigree of the family of the Copes was admitted, viz., that Walter Cope, the Bishop of Ferns, had five sisters, and that four of them died in his lifetime without issue; that the fifth was named Abigail Cope, who married Archdeacon Meade and had no male issue, but had one daughter, Sarah Arabella Abigail Meade, who married Nicholas Archdall, who took the name of Cope. That Nicholas Archdall Cope had issue Walter Archdall, who died in the lifetime of his mother unmarried; Samuel Walter, who also died in his mother's lifetime unmarried; and Arthur Walter, who, having married, had issue one daughter, Caroline Arabella Archdall, who married Francis Wilson Heath. That Nicholas Archdall Cope and Sarah Abigail Arabella Cope had but one daughter, Anna Archdall, who married Nathaniel Garland, and on his death reassumed the name of Cope.

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An attested copy of a recovery, suffered in Easter 1786 by Walter Cope, Bishop of Ferns, was given in evidence, and objected to as not being evidence against the defendant in respect of the lands in the declaration in ejectment mentioned, the lands claimed, being the manor of Dummilly, and Lissheffield being there mentioned as a distinct townland from it. It was however admitted by the Judge, and thereupon the first exception was taken, but this exception was not relied on.

An exemplification of a fine levied in Easter Term 1786 by Walter Cope, Bishop of Leighlin and Ferns, was also given in evidence; and amid the lands named therein, were "the manor of "Dummilly, otherwise Dunelly, &c., with the appurtenances, &c., "Licheaphill, otherwise Lissheffield," &c. This was objected to by the defendant's Counsel as not being admissible, as it was not evidence against the defendant in respect of the lands and premises in the ejectment mentioned, the same not being proved to be a fine of the said lands and premises, and the same appearing on the face of it not to be a valid fine of said lands and premises. This also was admitted by the Judge, and thereupon the second exception was taken, which also was not pressed.

An attested and compared copy of the enrolment of a deed leading or declaring the uses of a fine and recovery, and which deed was enrolled on the 2nd day of November 1786, was read in evidence, and the lands were again described "the manor of Dummilly, otherwise Dumally, &c., with the appurtenances, &c., the "whole or part of which was heretofore in the possession of Lieutenant William Cope deceased; the lands of Licheaphill, otherwise "Lissheffield," &c. There was no recital in this deed that any recovery had been suffered of these lands; its admissibility was objected to by defendant, alleging there was no such fine or recovery levied or suffered as therein referred to; but the Judge admitted it, and thereto the third exception was pointed.

The plaintiff having proved the signatures of the witnesses to the lease of the 14th day of March 1786, and that they were both dead, gave in evidence the said lease, by which Walter Cope (the Bishop of Ferns) demised to Catherine Connor, her heirs, executors, admi-

nistrators and assigns, "all that holding in her actual possession, H. T. 1848.  
 "being in the townland of Lissheffield, containing, with no bog, *Queen's Bench.*  
 "11A. 1R. 11P., English measure, be the same more less, with all *Lessee*  
 "the rights," &c., to hold for three lives and thirty-one years, at a *GARLAND*  
 rent of £11. 6s. 3d. and one shilling as receiver's fees, &c. This *v.*  
 lease was objected to as inadmissible at all against the defendant, or *COPE.*  
 if admissible, that it could only be admissible as evidence of the  
 Bishop's possession of the particular lands and premises in the lease  
 mentioned, and not of his being seised or possessed of all the pre-  
 mises and estate in the ejectment mentioned. The Judge was of  
 opinion that it was admissible in evidence of the Bishop's possession  
 and seisin in fee of the portion of the lands of Lissheffield therein  
 mentioned; and that, coupled with the other evidence in the case,  
 afforded some evidence of the Bishop's seisin in fee of the entire  
 Dummilly estate; and to this ruling the fourth exception was ten-  
 dered.

The receipt of the 5th of January 1787 was then read, and was  
 in these words:—"Received from Catherine Noker (Connor) six  
 "pounds, one shilling and nine pence sterling in full for her last  
 "May rent for her holding in Lissheffield. Received for the use  
 "of the Lord Bishop of Ferns, and in the absence of Mr. Thomas  
 "M'Kane, by me, on the 5th day of January 1787.

"MICHAEL M'CULLAGH."

To the admissibility of this receipt in evidence a similar objection  
 was made, that it was not admissible at all against the defend-  
 ant; or if admissible, it was only so as evidence of the Bishop's  
 possession of the particular premises in the receipt mentioned;  
 but the Chief Baron held that it was admissible in evidence of  
 the Bishop's possession and seisin in fee of the portion of the  
 lands of Lissheffield therein mentioned, and coupled with the other  
 evidence in the case, afforded some evidence of the Bishop's seisin  
 in fee of the entire Dummilly estate; and to this opinion the fifth  
 exception was taken.

The will of Bishop Cope, dated 28th July 1786, being given in  
 evidence, it therefrom appeared that he devised "all the lands and  
 "hereditaments in the county of Armagh or elsewhere, whereof he

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"was seised, or to which he was entitled, in possession or reversion, together with the rights, members and appurtenances thereunto belonging, except his lot of ground and dwelling-house, with the appurtenances, in Granby-row, Dublin, and the lands and bog hereinafter mentioned, in Kinvigo in the county of Armagh, subject to the annuity for the purposes thereafter mentioned, and to the term of five hundred years thereafter also mentioned, to the use of Nicholas Archdall, Esq., and his (testator's) niece Sarah Arabella Abigail Archdall, otherwise Meade, &c., wife of the said Nicholas Archdall, during the term of their natural lives, without impeachment of waste; and from the decease of either of them the testator devised his said lands and hereditaments (except as thereinbefore excepted) to the survivor of them, for and during the term of the natural life of such survivor, without impeachment of waste; and from and after the determination of that estate by forfeiture or otherwise in his, her or their lifetime, to the use of trustees (naming them) and their heirs, during the lives and life of Nicholas Archdall and Sarah his wife, and the survivor of them, upon trust, to support contingent uses and estates, &c.; but nevertheless to permit and suffer Nicholas Archdall and Sarah Arabella Abigail Archdall and the survivor of them to receive the rents, issues and profits thereof, &c.; and on and after the respective deaths and failure of issue of his respective grand-nephews Walter Cope Archdall (the eldest son of his said niece Sarah Arabella Abigail Archdall) and Samuel Walter Archdall, second son of the testator's niece, to whom the said lands and premises were respectively limited, in the same terms as set forth in the demise to Arthur Walter Cope and his issue as thereafter stated, to the use of testator's grand-nephew Arthur Walter Archdall (third son of his niece Sarah Arabella Abigail Archdall), for and during the term of his natural life, without impeachment of waste, and after the determination of that estate, to the use of the said trustees during the life of the said Arthur Walter Archdall, to preserve the contingent uses and estates, &c.; but nevertheless to permit and suffer A. W. Archdall and his assigns to receive the rents, issues

“and profits thereof; and from and after his decease, subject as  
 “aforesaid, to the use of the first son of the said Arthur Walter  
 “Archdall, lawfully to be begotten, and the heirs male of the body  
 “of such son lawfully issuing; and for default of such issue, to the  
 “use of the second, third, fourth and all and every other the son  
 “and sons of the body of the said Arthur Walter Archdall, lawfully  
 “to be begotten, severally, successively and in remainder one after  
 “another as they and every of them shall be in seniority of age or  
 “priority of birth, and of the several heirs male of the body and  
 “bodies of such son and sons respectively issuing, &c.; and for  
 “default of such issue, subject as aforesaid, to the use of the third,  
 “fourth, and all and every other the son and sons of the body of his  
 “said niece lawfully to be begotten, severally, successively and in  
 “remainder, &c., and of the several heirs male of the body and bodies  
 “of such son and sons respectively issuing, &c.; and for default of  
 “such issue, then, subject to the conditions aforesaid, to the use of the  
 “first daughter of the body of his said niece lawfully to be begotten,  
 “and the heirs male of such first daughter lawfully issuing; and for  
 “default of such issue, to the use of the second, third, fourth and  
 “all and every other the daughter and daughters of the body of his  
 “said niece lawfully to be begotten, severally, successively and in  
 “remainder,” &c.; and for default of such issue, subject to the  
 conditions specified, with divers remainders over. The testator then  
 empowered Walter Cope Archdall and the other male devisees of his  
 lands, except Nicholas Archdall, when and as soon as they respec-  
 tively became entitled to the possession of the lands devised, to  
 charge all or any part thereof by deed with a rent-charge or sum  
 of money not exceeding £400 as a jointure for any wife or wives he  
 or they should respectively be married to; and he also empowered  
 the several devisees of his lands (except Nicholas Archdall and his  
 niece Sarah), as soon as they became entitled to the possession of the  
 lands, to charge all or any part thereof with any sum of money not  
 exceeding £4000 for portions for younger children. The testator  
 then directed the lot of ground and house in Granby-row to be sold,  
 and the produce vested in trustees, as a provision for the younger  
 children of Nicholas Archdall, and devised to the same trustees,

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their executors and administrators, all his Armagh property, except the house, offices and demesne of Dummilly and the bog of Kinvigo, for the term of five hundred years from his decease, upon trust to raise by sale or mortgage of said term the sum of £4000 as a provision for the younger children of Nicholas Archdall and Sarah Abigail. An objection was taken to the reading of the will, that there was no evidence given or shown that Walter Cope was seised of or entitled to in fee-simple the lands and premises in the ejectment mentioned at or previous to the time of making his will, or that at the utmost there was evidence of such seisin or title in the Bishop as to the lands of Lissheffield only. This objection was overruled by the Chief Baron, and the will was given in evidence; and to this the sixth exception was taken.

An indenture dated the 29th of September 1818 was then given in evidence. This was executed between Nicholas Archdall Cope and Sarah Abigail his wife, of the first part, and Nathaniel Garland and Anna Garland his wife (the said Anna being the only daughter, and one of the younger children of said Nicholas and Sarah), of the second part, and Silver Oliver and John H. Burgess, of the third part; and recited the marriage between Anna Cope and Nathaniel Garland, and that Nicholas Archdall had by bond bound himself to give his daughter £5000 for her portion; reciting further that the Bishop of Leighlin and Ferns, being seised in fee of certain towns, lands and premises therein mentioned, made his will and devised them, subject to the conditions therein expressed, to the use of Nicholas Archdall and Sarah, during their joint lives, and to the survivor of them for life, without impeachment of waste, and after the death of the survivor remainder to the first and every other son in tail male, with remainders over; that he had devised these lands for a term of five hundred years to raise £4000 for the younger children of Nicholas Archdall and Sarah, to be appointed by Nicholas: said indenture witnessed that Nicholas Archdall did thereby appoint the sum of £2000 unto Anna Garland, her executors, administrators and assigns, the said sum to be raised after his and his wife's decease, by sale or mortgage of the term. The defendant's Counsel again objected that this deed and its recitals

were not evidence against the defendant as a declaration of the said Nicholas Archdall Cope, she not having or claiming, or deriving title to the lands in the declaration under or through the said Nicholas. The Judge overruled this objection also, and admitted the deed as evidence. Plaintiff's Counsel then offered another indenture dated the 25th of September 1838, executed between Arthur Walter Cope of the first part, and Francis Wilson Heath of the second part, which recited the devise of the term in the Bishop's will, and that Arthur Walter Cope, as one of the younger children of Nicholas and Sarah, became entitled to the sum of £2000, one-half of which portion had been theretofore raised; and that he had agreed to assign the said principal sum for certain good considerations to Francis Wilson Heath; and then witnessed that he did thereby assign to Heath the said principal sum. A similar objection was taken to the reading of this deed, viz., that it and its recitals were not evidence against the defendant as a declaration or admission of the said Arthur Walter Cope that the Bishop was seised of the lands. The Judge again ruled the evidence admissible as a declaration or admission of Arthur Walter Cope; and to this another exception was taken.

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The registration memorial of an indenture of the 22nd of April 1844, executed between Francis Wilson Heath of the first part, and Arthur Walter Cope of the second part, was then offered by the plaintiff in evidence. It recited a mortgage of the 28th of November 1822, between the surviving trustee in the Bishop's will and others, and A. W. Cope, by which A. W. Cope mortgaged the sum of £1000, part of the £4000 directed to be charged by the Bishop's will, and then witnessed that Francis Wilson Heath assigned to A. W. Cope, his executors, &c., all that and those the therein mentioned lands known by the name of the Dummilly estate, and comprised in the said term of five hundred years. The objection to this deed that was raised was, that as the original deed of which it purported to be a memorial was not proved to have been executed by Arthur Walter Cope, or traced to his possession, nor shown to have been accepted by him, that therefore it was inadmissible in

H. T. 1848. evidence. The Judge again ruled against the objection, and thereto  
*Queen's Bench.* another exception was taken.

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A second exception, grounded on this ruling, was taken on the same ground as to the last deed, that its recitals were not admissible in evidence against the defendant, as a declaration of A. W. Cope, in respect of the matters therein stated, she not claiming through him.

With this deed the plaintiff closed his case; thereupon the defendant's Counsel called for a nonsuit or a direction for a verdict for the defendant, on the ground that the memorial of the indenture of the 22nd of April 1844 showed that the legal estate in the lands in the declaration was not, at the date of the demise in the declaration, in Anna Garland, the lessor of the plaintiff. The Chief Baron refused, and again an exception was tendered to his ruling.

A consent order was then read, by which it appeared that the defendant undertook not to rely on any outstanding legal estate, or to set up temporary bars at the time of the ejectment.

The defendant's Counsel then called for a direction to the jury, that there was no evidence that the Bishop was seised of or entitled to the lands in the ejectment mentioned at or previously to the making of his will; or, at the utmost, that there was evidence of his being seised or entitled to Lissheffield only. The Chief Baron, however, told the jury that the indenture of lease of the 14th of March 1786 and the receipt of the 5th of January 1787, coupled with the declarations of Nicholas Archdall Cope and Arthur Walter Cope, as appearing in the recitals in the several deeds, and with the evidence of the receipt of rents from tenants of the Dummilly estate, were evidence of the seisin and title of the Bishop of, in and to all the lands in the declaration in ejectment mentioned at the time of executing his will. To this direction there was another exception.

The defendant's Counsel then insisted, that as the declaration in ejectment was confined to the lands of Dummilly, any evidence affecting other lands not comprised in the town and lands of Dummilly ought not to be left to the jury. The Judge thought the whole should go to the jury, and accordingly the defendant again excepted.

The defendant's Counsel then gave in evidence an indenture executed previously to the intermarriage of Walter Cope the elder and Sarah Tipping (which marriage was solemnized), the father and mother of the Bishop, dated the 21st of March 1703, and executed by the said Walter Cope the elder of the one part, and Thomas Tipping and Sarah Tipping of the other part, which settled the lands of Dummilly, and Ardna and Greenan, the estates of which Walter Cope was seised, to his own and his wife's use for life, and after the death of the survivor to their eldest son in tail male; and in default of such issue to the second, third and fourth sons successively and their heirs male; and in default to the use and behoof of all the daughters of said Walter and Sarah, as tenants in common, and the heirs of their respective bodies, and then to the right heirs of Walter Cope for ever. It was then insisted that the recovery suffered in Easter Term 1786, and the fine so levied by the Bishop, and the deed to declare the uses thereof, were not, nor was any or either of them, a valid recovery, fine or deed so as to bar the estate tail in remainder limited and given to the female issue of the said Walter Cope the elder by the said deed of the 21st of March 1703, in the lands of Dummilly, Ardna and Greenan, and under which limitations Caroline Arabella Archdall (the daughter of the defendant and Arthur Walter Cope) was then entitled as the issue in tail female under said indenture. But the learned Judge held they were sufficient to bar the estate tail in remainder so limited; and again the defendant's Counsel excepted.

The Judge then left the consideration of all the matters to the jury, and directed them to find for the plaintiff, if they believed upon the evidence that the said Walter Cope, Bishop of Leighlin and Ferns, was seised in fee of said lands and premises in the declaration in ejectment mentioned at the time of making and publishing his will and of his death; and if they were satisfied of his possession at such periods, such possession, if un rebutted, was *prima facie* evidence of his being so seised.

He further explained to the jury that the lease executed by the Bishop prior to the will, and the receipt for rent, was evidence; and if the case stopped there, they should only find for the premises in the

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lease; but there was other evidence—that of the parties who made the several declarations aforesaid; and if these persons were at the time in receipt of the rents of the Dummilly estate, and by such declaration treated their title as derived under the will of the Bishop, and did derive their estate under said will, there was evidence of enjoyment consistent with the limitations in the will, and a declaration inconsistent with their holding under any other title: that there was on the part of the plaintiff evidence of the ownership of Dummilly; and if, in their opinion the Bishop was seised in fee, they should find for the plaintiff. The jury found a verdict for the plaintiff, and the defendant's Counsel then tendered a bill of exceptions.

*Joy* (with whom were *Holmes* and *Ross Moore*), in support of the exceptions.

This was an ejectment brought for fifteen or sixteen townlands, and in the several deeds that were given in evidence the town and lands of Dummilly (it being for what is called the Dummilly estate the ejectment was brought) are described as held under one proprietor; and the other townlands are described as being in the possession of another. We, on the part of the defendant, objected to the admissibility of a lease, dated the 14th of March 1786, of eleven acres of the townland of Lissheffield as not being *per se* evidence, *prima facie* evidence, to go to the jury of the seisin in fee of Bishop Cope in all the lands comprised in the Dummilly estate; there was no proof that the Bishop received any rent for any townland except that one of Lissheffield. Such evidence is not admissible unless there be a unity of character in the premises the subject of the claim: *Doe v. Kemp* (a); *Jones v. Williams* (b). The lessor of the plaintiff claiming as devisee under a will, it was necessary to show a seisin in the testator. A witness was examined, who swore to having had possession of these eleven acres for seven years; but it did not appear he had paid any rent, and he said they were part of the Dummilly estate; he may have considered them

(a) 2 Bing. N. C. 102.

(b) 2 Mees. & Wels. 396.

as belonging to the person who lived at Dummilly, and that would be consistent with the documentary evidence, the recovery suffered in 1786, and a fine levied in the same year. The deed leading to uses of the 3rd of May 1786 specifies sixteen different denominations.—[CRAMPTON, J. Are they all comprised in the manor of Dummilly?—There was no evidence of what that manor was. The lease could not be evidence of the Bishop's seisin of Lissheffield; and it having gone to the jury as evidence of his seisin in the entire estate, perils the verdict.

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Then we objected to the deed of the 29th of September 1818, executed by Nicholas Archdall, who married the Bishop's niece and assumed the name of Cope, by which a charge was appointed of certain sums in favour of younger children. This was done in pursuance of the Bishop's will. The deed was executed after Nicholas Archdall's daughter married, and it thus was directly his interest to establish the Bishop's seisin in the lands. He was tenant for life under that will after his wife's death, and under the limitations in the will the estate after the failure of issue male reverted to the issue female. The deed could only be executed under the will, for his wife was heiress-at-law, and the power of charging was only given under that will. In that deed is recited that the Bishop was seised in fee in 1786 of the lands thereafter mentioned; and this recital is given in evidence as evidence of seisin in all these lands.—[CRAMPTON, J. Is the charge on all the lands of which the Bishop was seised?—The will does not specify the lands, and the charge is quite indefinite. But how is the declaration of Nicholas Archdall, affirming one thing, evidence against a stranger? It must be shown that declaration was against his own interest.—[PERRIN, J. Did it not appear he was in possession at the time the deed was executed?—He was; but still there was no evidence to show the declaration was against his interest.

We objected also to the deed of the 29th of December 1838, on similar grounds. That was executed by Arthur Walter Cope, who was a younger son of Nicholas Archdall. This deed was executed when his mother was in possession of the premises, she having a life estate under the Bishop's will. If that were not a valid will, Arthur

H. T. 1848. *Walter Cope* had no interest until the estate of his elder brother  
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was exhausted; and yet the recitals in that deed were also sent to the jury as evidence of declarations by Arthur Walter that the Bishop had made a will, and that he (Arthur) claimed under it. But that could not prove seisin of the lands in the Bishop; the deed was avowedly made by a party not in possession of the lands: *Crease v. Barrett* (a); *Doe d. Sweetland v. Webber* (b). In *Phil. on Evidence*, p. 305, it is said:—"The declarations "of a person who has parted with his interest in land (as by "executing a settlement) cannot be adduced for the purpose "of impairing the rights of persons acquired under the settle- "ment merely because they affect the title to the land. It seems "necessary in order to make the declaration of a deceased person "admissible as being an occupier of land, to prove the fact of his "occupation: it is not enough that the declarations purport to be "against the interest of the maker:" thus showing the ingredients that are essential to make declarations evidence against a third party. Doubtless where a tenant is in possession of lands and makes a declaration that he is tenant, there is a class of cases where such declaration made is admissible against him and those claiming under him; but the person making that declaration must be one within whose knowledge the matter of fact is; it must also be an admission against his own interest, and an admission made whilst in possession. The recitals in this deed do not involve any of these requisites, and were quite inadmissible.

We likewise objected to the deed of the 22nd of April 1844, executed by Francis Wilson Heath, in whose favour the sum of £3000 was charged by that deed of 1838. Walter Arthur Cope never executed this deed, and it was not produced; they proved a memorial of it, and relied as an excuse for its non-production that it was last seen in the office of the attorney of Arthur Walter Cope, which attorney was at the time the attorney of the defendant, and that it was evidence against the defendant. Before it could be given in evidence as a declaration against us, they must show it was

(a) 1 Cr. Mees. & Ros. 931.

(b) 1 Ad. & El. 783.

executed by Arthur Walter Cope. There was no evidence that he ever had the deed in his possession, that there was a search made for the original, or any proof of the loss of that original—[MOORE, J. The memorial was executed by Heath, and in *Pike v. Lord Howth* such evidence was admitted.]—In that case there were items of evidence running over one thousand years, none of which appear in the present case. The Registry Act in Middlesex is not unlike our own; and in *Doe d. Loscombe v. Clifford* (a), Alderson, B., says:—"The memorial is only evidence against the persons who register the deed, and persons claiming under them." We do not claim under Arthur Walter Cope, nor is it necessary we should state under whom we do claim. There being then no proof of the loss of the deed, or of possession at the time of making the declaration, this evidence was also inadmissible. If any of these deeds were improperly received, we are entitled to a *venire de novo*. We do not rely on the objections taken to the recovery and the fine and the deed leading to uses.

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Queen's Bench.  
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*Tomb and Napier*, contra.

The lessor of the plaintiff claims in remainder under the Bishop's will made in 1796, by which a trust term of five hundred years was created to raise portions, and the estate was limited over to the sons of Nicholas Archdall in tail male. Arthur Walter Cope was the last of the male stock, and the defendant is his widow. The male stock being exhausted, the plaintiff claims under the remainder to the female issue. This is the answer to the meagreness of the evidence; for a person claiming in remainder would have no means of getting at documents or deeds, the foundation of the title. We have nothing to do with the weight of evidence; for if there was but a particle of evidence on which the jury could decide, it is enough. On the construction of bills of exceptions, Tyndal, C. J., in the case of *The Bishop of Meath v. The Marquis of Winchester* (b), says:—"But we think that in construing the statement "contained in a bill of exceptions, we are to consider ourselves

(a) 2 Car. & Kir. 448.

(b) 3 Scott, 577; S. C. 4 Cl. & Fin. 538.

H. T. 1848. “placed in a situation analogous to that of a jury; and that, like a *Queen’s Bench*.  
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“jury, we are bound to make every legal presumption from the facts stated, and every reasonable inference which those facts will bear.”

It is clear from the evidence of Hardy, the agent, that the whole estate was included in his statements; he proved Nicholas Archdall Cope enjoyed the property under the limitations in the will, and that he and his father before him had received the rents of the Dummilly estate since 1795. Then we bring down the evidence from 1795 to the possession of Nicholas Archdall’s widow, by the admission of the several parties enjoying the premises under the will, and surely that is some evidence of a seisin in fee by the Bishop. The will devised all the lands the Bishop held in Armagh—[CRAMPTON, J. No doubt that was evidence as far as Dummilly and Lissheffield were concerned.]—And the several deeds were given in evidence, not to show that the defendant claimed under any of the parties to them, but on the general principle laid down in *Doe d. Daniel v. Coulthred and Baldrey* (a). Any one in possession of an estate may explain that possession; and so Nicholas Archdall, being in 1818 in full enjoyment of the property, created the charge authorised by the will. The memorial of the deed of 1838 reconveying the charge to Arthur W. Cope was quite admissible.—[CRAMPTON, J. The objection is, you used it as secondary evidence without laying grounds for its admissibility.]—The exception is not so pointed, nor was the Judge’s attention directed to remedy what Counsel might have neglected. There is no averment of notice to produce the deed; and as the objection is taken, it is quite consistent with it that we had served notice to produce; for the objection is not want of notice to produce, but because it was executed only by Heath. We proved that the deed was executed and left with the attorney of Arthur Walter Cope; and unless he repudiated it, it was clearly a conveyance of the estate thereby given to him. The statement in the exception admits the deed was executed, and it was evidence to go to the jury that Arthur Walter Cope assented to it, it being left in

(a) 7 Ad. & El. 235.

his attorney's office and not returned. The objections to the recovery and the fine have not been pressed, and therefore the Judge's charge was quite correct: *M'Alpine v. Magnell* (a). The serious objection however is as to the admissibility of the deeds to show seisin in the Bishop. We were driven to show a reconveyance of the legal estate and that it merged in the tenant for life. We proved payment of rent under the lease of Lissheffield, and we offered that lease as one piece of evidence consistently with the rule laid down in *Doe d. William the Fourth v. Roberts* (b), by Parke, B., where he says, "if you prove acts of ownership in different parts of an estate, you show a title to the whole estate." It must go to the jury *valeat quantum*, and so the Chief Baron left it, as showing the exercise of a right by the owner of the land over it. True the deeds were executed by successive tenants for life, but they are evidence of distinct declarations of holding under the will of the Bishop. Any declaration made by a person in possession is *primâ facie* evidence of a seisin in fee, and is good evidence against the world: *Doe d. Daniel v. Coulthred and Baldrey* (c). We gave no distinct evidence that Arthur Walter Cope was in possession when he executed the deed of 1838; but the reason of that was, because at the trial no such objection was made, for the exceptions go on this, that inasmuch as the defendant did not claim under Arthur Walter Cope, his declarations were not admissible evidence against the defendant. The objection was not because the persons who made the declarations were not in possession, for that they did not contravene, and now they cannot avail themselves of it. The admissibility of leases under such circumstances is established by *Clarkson v. Woodhouse* (d); *Rogers v. Allen* (e).

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*Holmes*, in reply.

The defendant must be regarded as a perfect stranger, not claiming in privity with any one. We admit they proved seisin in the Bishop

(a) 3 Com. B. 496.

(b) 13 Mees. & Wels. 530.

(c) 7 Ad. & Ell. 235.

(d) 3 Doug. 189.

(e) 1 Camp. 309.

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of the eleven acres of Lissheffield ; but it is only evidence of seisin in them, and of nothing more. How could that evidence of possession of eleven acres and payment of rent be evidence of the possession of thousands of acres of which the estate consisted ? It was but evidence of possession of that particular portion ; and it is only where the thing is of a continuous nature, as a waste or a belt of trees, or part of the sea-shore, that evidence of possession of part is to be received as evidence of the whole : *Stanley v. White* (a). If possession of eleven acres be possession of thousands, then evidence of one acre would as well suffice : *Tyrwhitt v. Wynne* (b). The mistake of the Judge was in leaving this evidence as evidence of possession to the whole estate. Besides, the receipt of rent under that lease was inadmissible ; it was not signed by the Bishop nor by his agent, nor by the receiver of the estate ; it purported to be signed, in the absence of the steward, by another person, and there was no proof that that man was dead, and yet it was received in evidence. Then the declarations were received as evidence of seisin in the Bishop ; but no proof was given that these declarations were against the interest of the party making them ; and though such might be evidence against privies, yet they cannot be against strangers. The person making the declaration must be in possession of the lands, and it must be against his interest before such a declaration could be admitted against a stranger. Arthur Walter Cope claimed under the will ; his wife was heiress-at-law. If there were no will, he at the utmost would be but tenant by the courtesy if he survived his wife : he then, as tenant by the courtesy, was punishable of waste, whereas under the will he is dispunishable of waste ; so that the effect of his declaration would be to increase the value of his estate. We are not privies in any respect. Then the deed of 1838 was used as evidence of a declaration by Arthur Walter Cope ; but even the admission of a party on oath is not sufficient evidence to prove the execution of a deed ; and our objection to its reception was, that there was no evidence it was ever executed by Arthur Walter Cope. Illegal evidence therefore as against

(a) 14 East, 332.

(b) 2 B. & Ald. 564.

the defendant has been received, and there should be a *venire de novo*.

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*Queen's Bench.*

*Cur. ad. vult.*

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CRAMPTON, J.

Jan. 28.

This case comes before the Court on a bill of exceptions taken to the charge of my Lord Chief Baron, at the last Summer Assizes for Armagh county. The ejectment was brought by Anna Garland, who claims under a remainder in the will of Walter Cope, formerly Bishop of Leighlin and Ferns. The ejectment describes the premises as "all that and those the lands and premises of Dummilly "in the county of Armagh, and usually called the Dummilly "estate, as late in the possession of Arthur Walter Cope deceased."

The facts on which the verdict was had, and with respect to which these exceptions are before us, are shortly these:—Walter Cope, Bishop of Ferns, being in possession of and residing at Dummilly-house, in 1786, made his will, by which he devised all the lands and hereditaments of which he was seised in the county of Armagh, to Nicholas Archdall Cope and Sarah his wife, for their joint lives, and the survivor of them, with remainder to their first and other sons in tail male, with remainder to their issue female. The lessor of the plaintiff is the sole daughter of that marriage, and claims under the second remainderman in tail. There was a power given by the will to the tenant for life to create a charge not exceeding £4000 for younger children; the Bishop died in 1787; and the question that arose at the trial was, whether there was evidence of seisin in fee in the Bishop of the premises in the ejectment mentioned?

There was no direct evidence given of the possession of the whole of the estate by the Bishop in his lifetime; but there was distinct evidence of his possession of one denomination of the estate called Lissheffield; that evidence was a lease of part of Lissheffield and possession under it, with payment and receipt of the rents. One objection taken by the defendant was, that the description of the premises in the declaration could not be extended beyond the lands

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of Dummilly, which was only one denomination out of the fourteen or fifteen denominations for which the ejectment was brought; but that objection is I think out of the case by the wide terms of the declaration, comprehending the whole of the Dummilly estate, and by the evidence which goes to show that the whole of the Armagh property was known and called by the name of the Dummilly estate. On the death of the Bishop, the first tenant for life N. A. Cope and his wife entered into possession; there was no evidence of the receipt of rent from 1787 to 1795; but from the year 1795 to the period of the death of the last tenant for life in 1846, the rents were regularly received out of the whole of these lands, the general name of them being the Dummilly estate. Nicholas Archdall Cope was in possession up to 1820, and in 1818 he executed the charging power given by the will of the Bishop, by charging the sum of £4000 in favour of his younger children. At that time he had three sons and one daughter; the youngest son was Arthur Walter Cope, who died in 1846, the two elder sons died in their mother's lifetime without issue, and in 1820 Sarah Cope entered into possession as surviving tenant for life, and remained in possession and receipt of the rents and profits of the estate until 1844: when exactly she died does not appear, the evidence is loose on the subject; but on her death, sometime in 1844, her son Arthur Walter Cope entered into possession of the rents and profits, and so continued until 1846, when he died without male issue, whereupon the defendant his widow has since retained the possession, and the ejectment is brought by the plaintiff asserting her title in remainder under the will of the Bishop. The power of creating a charge for the younger children of N. A. Cope and his wife was, as I have before stated, exercised in 1818.

It further appeared that in 1838, Sarah Cope being then in possession by survivorship, Arthur Walter Cope, then a younger son, executed a deed by which he assigned to one Francis Wilson Heath a sum of £1000, part of his portion, as a younger child, of the £4000 charged on the estate by the deed of 1818. It further appeared that in 1844, F. W. Heath re-assigned to Arthur Walter Cope the portion of the £4000 charge which had become vested in him. It

does not very distinctly appear whether in 1844, when this re-assignment was made, Arthur Walter Cope's mother was or was not living; I should rather collect from the evidence that she was not living at that time, but we cannot now assume that. The defendant gave in evidence a deed of the year 1703, by which it appeared that Bishop Cope was in 1783 seised in fee tail of the Dummilly estate: evidence was given by the plaintiff, in anticipation of this, by the production of a recovery suffered by the Bishop as of Easter Term 1786 of the Dummilly property, and of a fine levied.

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The Lord Chief Baron charged the jury that the fine and recovery were evidence of a seisin in fee in the Bishop at the time of his death, and that he had power to make the will under which the plaintiff claimed.

The will was read by the plaintiff; several exceptions were taken, no less than eighteen in number, to the ruling and direction of the the Chief Baron. With respect to the first and main question, namely, the seisin in fee of the Bishop in 1786, there was the most abundant and coercive proof to go to the jury in favour of the plaintiff. The deed of 1703, the fine and recovery, the lease of Lissheffield and the possession under it were evidence for the jury of the Bishop's seisin; but in addition it was shown that the estate has been enjoyed from 1786, a period of sixty years precisely, in conformity with and distinctly following the limitations in the Bishop's will. The successive tenants for life had received the rents and profits under that title down to the year 1846; therefore the exception going to this point is quite unfounded.

The Counsel for the defendant in their argument did not rely on all the exceptions, but they relied upon some which I shall notice in their order. The first of them is an exception to the reception in evidence of the lease of Lissheffield as evidence of the Bishop's seisin in fee: possession under that lease was proved, and receipt of rent under it by the Bishop. There was some criticism on the receipt passed for the rent, because it was not signed by the Bishop's ordinary agent, but there is no doubt that the receipt was substantially proved. But it was argued that this evidence, the evidence of seisin of the denomination of Lissheffield, was not nor

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could be evidence of the Bishop's seisin in the other denominations of the estate. That may be conceded, for the Lord Chief Baron did not hold that this lease *per se* was evidence of possession of the Bishop in the fourteen other denominations, but that it was evidence to be received along with the other evidence in the cause that the Bishop was seised of the whole estate: and what is the other evidence? That all these denominations together were called the Dummilly estate, and were enjoyed by community of title by the successive devisees in whose favour the several limitations in the will were made. Therefore that objection also fails.

The admission of the deed of 1818 was the subject of the next exception relied on. It was contended that the deed of 1818 must be taken to be the mere declaration of the tenant for life by whom it was executed, and that it could not be evidence of the Bishop's seisin to affect the defendant, who must be taken to be a mere stranger. How far the defendant is entitled to that character, retaining the possession of her husband from her husband's death to the present time, might perhaps be made a question. But conceding now that the defendant is to be taken to be a stranger, and admitting that generally a stranger cannot be affected by a declaration made by a person under whom he does not derive, I still think the deed of 1818 was admissible for the plaintiff in this case. For, first, that deed is not a mere declaration by a tenant for life; and yet if it were, it is a declaration made by a party against his own interest. He is in possession when he makes it, and possession is *primâ facie* evidence of a holding in fee; and he makes a declaration cutting down his estate to one for life, with a mere power to charge for younger children. The case of *Doe d. Daniel v. Coulthred* (a) is precisely in point.

But again, this deed of 1818 is not merely a declaration by the tenant for life, it is something stronger; it is an act, a substantial act, done by the possessor of the estate: the declaration is merely the mode and the circumstances under which the act is done. It is an act of ownership, like the making of a lease, showing possession

(a) 7 A. & E. 235.

and ownership precisely in conformity with, and under the limitations of, Bishop Cope's will, showing that he had authority to make the will, and thus showing seisin in him. This observation applies substantially to all the deeds whose admissibility has been excepted to.

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That act of 1818 was however the act of a tenant in possession; but the deed of 1838 differs from it in this important respect, that the deed of 1838 was executed by a party not then in possession of the estate. In 1838 the widow of Nicholas Archdall Cope was undoubtedly in possession, as tenant for her life; and Arthur Walter Cope, who executed the deed of 1838, was then entitled only to a share of the £4000 charge created under the deed of 1818, and only in that right and as a remainderman he was interested in the estate of Dummilly; but may not the same principle which let in the deed of 1818 be also applied to the deed of 1838? Arthur Walter Cope was then proprietor of a moiety of the £4000 charge, and thus interested.

Arthur Walter Cope executed the deed of 1838, by which he assigned £1000, a portion of this charge, to Francis Wilson Heath. This act (for it was not a mere declaration) is done under and in pursuance of the limitations of the will of 1786. It shows that the estate of Dummilly was enjoyed according to the limitations and powers created and given by that will, and seems to me, therefore, to have been admissible in evidence for the purpose for which it was given—namely, to show a seisin in fee in Doctor Cope. It was, perhaps, also evidence by way of anticipation, to meet the case of a legal bar being set up by the defendant; and for the purpose of showing, with the deed of 1844, that there was no outstanding term against the plaintiff. It was an act done by a party interested under the will of Bishop Cope, affirming his title; and it stands on the same ground as if a lease had been made evidencing the title of Bishop Cope, and validating the limitations in his will.

The next exception relied on was the admission in evidence of the memorial of the deed of 1844, which was a re-assignment by F. W. Heath to A. W. Cope of the portion of the £4000 charge which was vested in F. W. Heath under the deed of 1838. I will

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take it that the deed of 1844 was executed by F. W. Heath only, and not by A. W. Cope, the grantee named in it; this will not change the question. This deed did not from its nature require execution by the grantee; but there is evidence that it was accepted by A. W. Cope the grantee, and he is therefore a party to all its recitals and contents as if he had executed the deed. The exception taken to its admissibility does not extend so far as it was pushed in argument.

The memorial is to be taken on this exception as if the deed itself had been produced and offered in evidence. No objection was taken to the memorial as secondary evidence of the deed itself; but the objection is twofold: first, that the deed of 1844 was not executed by A. W. Cope, and could not therefore be received as a declaration of his; and secondly, that the memorial and its recitals, even as declarations of A. W. Cope, ought not to be admitted in evidence against the defendant as being a stranger. The first part of this exception is already answered—though not an executing party, A. W. Cope was a party to the deed of 1844 by his acceptance of it, of which there was evidence to go to the jury.

But the main question on this exception is, was this memorial and its recitals, taking A. W. Cope to be a party to them, evidence against the defendant to show a seisin in fee of the Dummilly estate in Bishop Cope? There can be no doubt generally that a stranger cannot be affected by a deed *inter alias partes*, or by the recitals in a deed. But the deed of 1844 is not a mere declaration; it is a substantive act by parties claiming and having an interest in the Dummilly estate; an act done under the will and in pursuance of the limitations of the will of Bishop Cope. It stands, therefore, on the same ground as the deed of 1838 does. It is admissible as an act of ownership showing possession under the will, and therefore evidence of seisin in the testator. It is objected however that the memorial was put by the Chief Baron to the jury not as an act, but as a declaration merely of A. W. Cope; and undoubtedly such is the form of the Chief Baron's direction, and perhaps that may not have been the accurate way of stating the evidence; but looking to the substance of the direction, the state of

the cause, and the issue to which the evidence was applied, it seems to me that the Chief Baron's ruling was substantially right. Taking this memorial and its recitals to be a declaration of A. W. Cope, it was a declaration coupled with an act; and if you admit the act as evidence, it seems difficult to exclude the declaration, which cannot be separated from it. If the deed was admissible, it must have been read to the jury, and I think the defendant's Counsel should have pointed their objection to the distinction between the deed as an act and the recitals contained in the deed. Their objection is not to the recitals, but the objection is to the reception of the deed, on the ground that its recitals were not evidence against the defendant. The recital of the mortgage in the deed of 1844 was unconnected with the case of the plaintiff, which was to show a seisin in fee in Bishop Cope, or with the defendant's case, which was a denial of that seisin; and possibly had the learned Judge been called on to tell the jury that the recitals were not evidence of the facts stated in them, he would have so declared. But such a direction would not have served the defendant, and therefore he did not call for it. I cannot now separate the declaration from the act, and I think the act done by parties interested in the estate under the will of Bishop Cope, and done under that will and in pursuance of its limitations, was evidence to go to the jury of that which was the issue to be tried, namely, the seisin of Bishop Cope. The opinion of the Court is that the exceptions must be overruled; and I have the authority of my Brother MOORE who heard the argument, but is now necessarily absent in another Court, for saying that he concurs in the judgment.

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PERRIN, J.

Every piece of evidence objected to was legally admissible and went directly to the issue in question. If at the close of the trial the attention of the Lord Chief Baron had been called to the effect of the evidence, he would not have signed some of these exceptions; for I do not think a Judge is bound to sign exceptions taken in this way.

Exceptions overruled.

H. T. 1848.  
*Queen's Bench.*

In re FREDERICK BYRNE.

Jan. 29, 31.

The 1 & 2 Vic. c. 56, s. 59, (Poor-law Act) provides that if any person shall desert his wife or child, so that they become relievable in a workhouse, every such offender shall, on conviction before a Justice of the Peace at Petty Sessions, in open Court, be committed to gaol, to be kept to hard labour for any term not exceeding three months. 10 & 11 Vic. c. 54, s. 1, repealed that clause, and provided that every person who should desert or willfully neglect to maintain his wife or child, so that they became relievable in or out of a workhouse, should be committed to gaol and kept to hard labour for a term not exceeding three months. A

committal, bearing date in 1848, and stating that B., on the 8th of August 1845, at Henry-street, within said district, did desert his wife and children, and that they became destitute, and were on the 29th of December last past admitted into the workhouse in said district, and were still relieved there:—*Held*, a bad committal, there being nothing in it to show that the destitution and the relief afforded were connected with the particular desertion in 1845; and the statute not having passed until 1847, the offence must have begun after the passing of that statute.

*Held also*, Divisional Magistrates of the Police District of Dublin have jurisdiction, in every case of offences committed within their district, that are punishable by a Justice.

THE prisoner was brought up under a *habeas corpus* directed to the governor and keeper of the Richmond Bridewell, in the county of the city of Dublin. The return made to this *habeas corpus* by the governor was, that he had the body of Frederick Byrne in his custody under a warrant of commitment, of which the following is a copy:—

|  |  |
|--|--|
| <p>" Police District of Dublin }<br/>         " Metropolis, }<br/>         " to wit. }</p> | <p>" You are hereby required to detain<br/>         " in your custody the body of Frederick<br/>         " Byrne for the space of one month from the date hereof, who stands<br/>         " convicted before me, one of the Divisional Justices in and for said<br/>         " district, upon oath, for that he the said Frederick Byrne, on the<br/>         " 8th day of August 1845, at Henry-street, within said district, did<br/>         " desert and leave his wife Anne Byrne and his four children, namely,<br/>         " Francis Byrne, Mary Anne Byrne, Eliza Byrne and Lucy Byrne,<br/>         " whom he was liable to maintain, as that they became destitute, and<br/>         " were on the 29th day of December last past admitted into the South<br/>         " Dublin Union Workhouse in James's-street, in the said district,<br/>         " and were and are still relieved in said workhouse, contrary to the<br/>         " form of the statute in such case made and provided.</p> |
|--|--|

" Therefore the said Frederick Byrne you are in safe custody to  
 " keep for said period above mentioned, and for so doing this shall  
 " be your sufficient warrant.—Given under my hand and seal this  
 " 24th day of January 1848. " THOMAS F. KELLY,

" One of the Divisional Justices of the Rotunda Division  
 " of Police of and for the said district.

" To the Keeper of Richmond Bridewell at South Circular-road."

*Butt*, on behalf of the prisoner, now moved that he be discharged from custody. The prisoner had been convicted under the Poor Law Acts for a desertion of his wife and children, whereby they became chargeable on the funds of the South Dublin Union; and this committal is bad, because the authority of the Magistrate does not appear on the face of it, nor can he be considered a Justice coming within the words in the statute "a Justice at said Sessions," or possessing authority to commit in such case; and because the offence is not stated to have been within six months, and because the statute is not specified. This committal is grounded on the 53rd & 59th sections of the 1 & 2 Vic. c. 56 (Poor Law Act); that 59th section prescribing that "If any person shall desert and leave his wife or any child whom such person shall be liable to maintain, so that such wife or child shall become destitute and be relieved in the workhouse of any Union, every such person shall, on conviction thereof before any Justice of the Peace at Petty Sessions in open Court, either by the confession of the offender, or by the evidence of one or more credible witness or witnesses, be committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding three calendar months." The committal here is not by a Magistrate at Petty Sessions, but by "one of the Divisional Justices of the Rotunda division of the police of and for the said district." The Divisional Justices have no jurisdiction to hear such a case; and even if they had, it does not appear on the face of this committal to have been done at the Police-office, or that the offence was committed within six months before conviction; nor does it show that the children who were deserted were under fifteen years of age.

The first statute as to the police district of the Dublin Metropolis is 48 G. 3, c. 140, which divides the police divisions into six. The 5 G. 4, c. 102, reduced the police district into four divisions. The 6 & 7 W. 4, c. 29, established a new police-office, and two new Magistrates for districts of Dublin Metropolis as same is constituted and defined in 48 G. 3, c. 140. The 3 & 4 Vic. c. 103 enlarges the jurisdiction authorising Divisional Justices to exercise in the parts of the county of Dublin included within the police district the

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Dublin within the police district. The 5 *Vic. sess.* 2, c. 24, is the last enactment on the subject, and the 47th section of that statute authorises one Divisional Justice of the Dublin police to do alone, at any of the divisional offices, or at any place where for any special purpose he may by warrant be directed to attend and to act singly, any act which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by more than one Justice, provided always that none of the said Justices shall be competent to act in any thing which is to be done at a Special or Petty Sessions. This shows that such Justice has no jurisdiction in a case of this sort. That is a positive prohibition against their acting as Justices at Petty Sessions. But the offence does not appear to have been committed in the county of Dublin; it is said to have been done "at Henry-street, in the said county of the city of Dublin." Henry-street is in the city of Dublin. Petty Sessions have not the authority of General or Quarter Sessions; "Nor does the term Court properly apply to them in the legal acceptance of the word, or as implying any peculiar jurisdiction or privilege not incident to Magistrates acting individually. The Petty Sessions are in fact mere voluntary associations of Magistrates meeting at such times and places, and acting according to such rules as local circumstances, the exigence of public business or the discretion of the individuals who composed them may suggest; but not conferring on the meeting as a body any greater authority than each member acting singly and in private would enjoy, except in the discharge of duties confined by statute to Petty Sessions, or so far as Justices acting elsewhere are required to transmit an account of their proceedings to the Clerk of the Sessions for their district:" *Nun & Walsh Justice of the Peace*, p. 76. Can any thing be more unlike than these duties and those of the Divisional Justices? But the 70th section of 5 *Vic. c.* 24, is also important; it provides—"That all offences committed within the limits of the police district which under this or any other Act are punishable on summary convic-

"tion before a Justice or Justices of the Peace, may be heard and  
 "determined by any one or more of the said Divisional Justices  
 "sitting at one of the divisional offices, or at any place within such  
 "district where any such Justice may be directed to attend, by  
 "warrant of the Chief or Under Secretary, as hereinbefore provided,  
 "in a summary way, within six calendar months at the farthest  
 "next after the commission of such offence, or within such shorter  
 "time as shall be limited by the Act specifying the offence, and not  
 "afterwards," &c.

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A committal ought to set out the right of the Magistrate to commit: *Rex v. York and Fielding (a)*. That essential is wanted here. *In the matter of Peerless (b)*; *Coster v. Wilson (c)*; *Wickes v. Clutterbuck (d)*.

Independently of that objection, no Magistrate has authority to commit for an offence of this description, unless within six months after its perpetration; here the desertion is alleged to have taken place "within twelve months theretofore, to wit, on the 1st day of July, or between the 1st day of July and the 8th day of August, "both in the year 1845;" the desertion is the offence, although the statutable penalties do not follow until afterwards.

*Baldwin* (with him was *John Perrin*), contra.

The Court will not act on the committal without having the conviction before them.—[PERRIN, J. Do you contend that if a committal be bad we are not bound to discharge the party?]  
 The principal objection urged here is, that the conviction was *coram non Judice*; but that 70th section of 5 & 6 Vic. c. 24, expressly gives the jurisdiction to the Police Magistrates to adjudicate on an offence of this sort. In the interpretation clause of 5 & 6 Vic. c. 56, it is said "the words 'Justice' or 'Justices of the Peace' shall, when any Justice or Justices is or are empowered to "do any magisterial or judicial act, either singly or at Petty Sessions, "include and extend to any Justice of the Peace, or any Magistrate

(a) 5 Burr. 2684.

(b) 1 Ad. & El. N. S. 143.

(c) 3 Mees. & Wels. 411.

(d) 2 Bing. 483.

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"of a county, county of a city, or county of a town, or of any city or town corporate, or any Assistant Barrister." The offence here is, for not having done a duty which the law casts on the offender. On the conviction it sufficiently appears that the complaint was heard at the Police-office, and it is also shown with sufficient certainty that the offence was committed within six months.—[CRAMPTON, J. Desertion is not an offence unless it be followed by the wife or child becoming destitute and relievable in the work-house.]—The desertion was continuous until they were taken to the work-house. The 10 & 11 Vic. c. 84, s. 1, repeals the 5 & 6 Vic. c. 56, s. 59; but the 2nd section enacts, that "Every person who shall desert or wilfully neglect to maintain his wife or any child whom he may be liable to maintain, so that such wife or child shall become destitute and be relieved in or out of the work-house of any Union in Ireland, shall, on conviction thereof before any Justice of the Peace, be committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding three calendar months."

The Court will not construe a warrant of commitment too strictly. In *Paley on Convictions*, p. 273, it is said:—"The Court, upon a return to the writ of *habeas corpus*, have nothing before them but the warrant of commitment itself; and therefore where a commitment was 'until the party should pay a fine to the King,' without specifying any sum to be paid, the Court nevertheless refused to discharge him upon the commitment alone, until the conviction itself was brought before the Court by *certiorari*, though when that was done and it appeared that no precise sum was there awarded, the defendant was discharged:" *In re Walker* (a); *In the Matter of Tordoff* (b). In the argument in that case it was admitted that the conviction might have been brought by *certiorari* before the Court and the commitment thereby supported.

*Butt* replied.

*Cur ad. vult.*

(a) 1 Sess. Cas. 182.

(b) *Ibid*, 171.

CRAMPTON, J.

We are of opinion that the prisoner must be discharged. There is a fatal omission in the committal; the statute 10 & 11 Vic. c. 84, requires that on conviction for the offence the prisoner shall be committed to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding three calendar months. Here, on this commitment, the gaoler has no warrant for carrying into execution the part of this sentence which refers to hard labour, unless we presume him to be conversant with the Act of Parliament. That objection was not argued, but we think it a fatal one. The offence consists of three parts—first, desertion; secondly, destitution, and thirdly, relief under the Poor Law Act. These three facts are alleged in the committal; but it is curious that the desertion is stated to have taken place in 1845. I think the desertion is an act of a continuing character; the relief administered was given within one month before the conviction; and if there were any thing on the face of the committal to show that the destitution and the relief afforded were connected with the particular desertion alleged to have taken place in 1845, I could not see any objection to the committal so far; but nothing of that sort appears.

The Court were a good deal pressed by the objection that a Divisional Magistrate had no jurisdiction to hear the case; but we are satisfied that he has jurisdiction in every case of offences committed within his district that are punishable by a Justice or Justices under that 70th section of 5 Vic. c. 24. Another section was referred to, to show that a Divisional Justice could not interfere, as the case was triable properly at Petty Sessions; but that 47th section applies to cases that could only be heard at Petty Sessions. The 10 & 11 Vic. c. 84, was a prospective Act, and could include cases only that happened after it passed. It came into operation on the 22nd of July 1847, and the offence here was not completed until December 1847, though the desertion took place two years before; but the committal in no way connects the desertion with the subsequent acts. It is also bad, as I before stated, in omitting the allegation that the prisoner should be kept to hard labour.

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The question is, was this committal warranted by 10 & 11 *Vic.* c. 84? I think not. The 1st section of that Act repeals 1 & 2 *Vic.* c. 56, s. 59; and the 2nd section provides that every person who should desert or wilfully neglect to maintain his wife or child, so that they become relievable in or out of the workhouse, should be committed to gaol and kept to hard labour for a term not exceeding three months. The Act, 1 & 2 *Vic.* c. 56, provided that every person who should "desert and leave" his wife or child, should be liable to the punishment therein specified; the latter statute (10 & 11 *Vic.* c. 84) omits the word "leave," and provides for a case of wilful neglect to maintain the wife or child. The Act is prospective, and yet the conviction does not state a desertion after the passing of that statute, nor does it at all allude to it; and though it has been suggested that desertion might be a continuing act, and that every week a new desertion might be laid, I would be slow to adopt that view on a penal Act of Parliament, and thus give it a constructive extension. But the conviction alleges the desertion to have been in 1845; how then can the Court hold the offender guilty under a statute passed two years after the offence committed? The Magistrate who adjudicated on the case considered that the 1 & 2 *Vic.* c. 56, was the statute applicable, and that the act of desertion was the single and complete offence; and although under 10 & 11 *Vic.* the offence may not have been completed until the burthen of the support of the wife and children was thrown on the Union, yet I hold that the offence must have been begun after the passing of that statute, for it provides for the very case omitted in 1 & 2 *Vic.* c. 56. The offence is complete every time that the party neglects to do what the statute imposes on him. The conviction, however, does not show any offence committed under the statute. The committal is bad, and we cannot presume it is incorrectly set out, nor presume facts to exist which are omitted from it. In no case can the Court uphold a faulty committal.

I therefore agree with my Brother CRAMPTON that the prisoner should be discharged.

*John Perrin* then applied that the prisoner be put under terms not to bring an action.

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We cannot make any such order.

*Per Curiam.*

It is ordered by the Court that the said Frederick Byrne be forthwith discharged from and out of custody; it appearing that the offence of desertion charged in the committal is under the 59th section of the 1 & 2 Vic. c. 56, entitled "An Act for the more effectual Relief of the Destitute Poor of Ireland," and which has been in that respect repealed by the 10 & 11 Vic. c. 84.

The prisoner was accordingly discharged.

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To an action THE declaration was in debt, and commenced by stating that the for poor's rate, defendant was summoned to answer the Guardians of the Poor of brought under the statute 6 & 7 Vic. the Ballinrobe Union of a plea that he render to them the sum of the statute c. 92, in one £100 which he owed to and unjustly detained from them, and of the Superior Courts against an immediate lessor, the consent of the Commissioners, who, at the institution of the action, are entrusted with the chief administration of the laws for the relief of the poor in Ireland, must be averred in the declaration, such consent being a condition precedent to the bringing of the action. It is not necessary that the consent should be given under the seal of the Board.

The declaration (filed in June 1848) in such an action, after referring to the statutes 1 & 2 Vic. c. 56, and 6 & 7 Vic. c. 92, stated that the Guardians sued "by and with the consent of the Poor-law Commissioners," but made no reference to the statute 10 & 11 Vic. c. 90 (passed the 22nd of July 1847), which recites that their commission would expire at the end of the Session of Parliament next after the 31st of July 1847, and which authorises the appointment of certain persons as "Commissioners for administering the Laws for relief of the Poor in Ireland." *Held*, on special demurrer, that the consent was sufficiently pleaded, there being nothing before the Court to show when the authority of the former Commissioners had terminated, or that of the latter commenced.

In an action brought by the Guardians of a Union against an immediate lessor, one count proceeded for "rates and arrears of rate," and contained language tending to show that by "rates" were meant sums due in respect of the most recently imposed rate; and by "arrears of rate" were meant sums due in respect of by-gone rates. The plaintiffs having shown a right to sums due in respect of the most recently imposed rate only, *Held*, on special demurrer, that the count was bad, and that the Court could not construe "rates" to be synonymous with "arrears of rate," the plaintiffs by their pleading having affixed to those expressions distinct meanings.

The argument on one point of a demurrer having terminated, the Court refused, with respect to that point at least, to listen to an objection then first made, that the demurrer was too large. But that objection was afterwards allowed to prevail with respect to the subsequently argued points of demurrer.

A count in an action for poor's rate, due in four Electoral Divisions of the Union, averred, as to two of those Electoral Divisions, publication of notice of the rate having been made, but omitted to aver such publication as to the two other Electoral Divisions; *Seemle*, that the count was bad in regard to the two latter Electoral Divisions. *Held*, however, that the cause of action being divisible, the demurrer should have been confined to the bad part of the count; and that having been aimed at the whole count, the demurrer must be overruled as too large.

A demurrer to a declaration containing several counts, commenced thus:—"And

\* TORRENS, J., absent, in consequence of illness.

thereupon the Guardians of the Poor of the Ballinrobe Union by, *H. T. 1849.*  
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 &c., their attorney, complained.

The first count was as follows:—"For that whereas the said  
 "Guardians of the Poor of the Ballinrobe Union, under and by  
 "virtue of the provisions of a certain Act of Parliament (made and  
 "passed 2 *Vic.*, &c.\*), entitled 'An Act for the more effectual relief  
 "of the Destitute Poor in Ireland;' and under and by virtue of the  
 "provisions of a certain other Act of Parliament (made and passed  
 "7 *Vic.*, &c.†) entitled 'An Act for the further amendment of an Act  
 "for the more effectual relief of the Destitute Poor in Ireland,' and by  
 "and with the consent of the Poor-law Commissioners, complain of  
 "the said Dominick Browne, that he render to the said Guardians the  
 "said sum of £100, for that heretofore and after the passing of the said

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the defendant by, &c., comes, &c., and saith that the said declaration, and the matters therein contained in manner and form as the same are above stated, are not sufficient in law," and then proceeded to assign causes of demurrer to each count separately; *Held*, that as some of the counts (*Semble*) were good, the demurrer was too large, and must be overruled accordingly.

In an action for poor's rate, brought against an immediate lessor by the Guardians of the Union, the plaintiffs may combine in one declaration, or in one count of it, claims for rate due from the defendant in respect of several Electoral Divisions of that Union. *Semble* in this case, and so *Held* in *Castlebar Union v. Browne* (*infra*, in *notis*.)

In a count for poor's rate, *Semble* in this case, and *Held*, in *Castlebar Union v. Browne* (*infra*, in *notis*), that the parties who allowed the rate, and their authority to do so (under 6 & 7 *Vic.* c. 92, s. 10), were sufficiently set forth by an averment—"that one A. B., to wit, a paid officer, who was then and there the Chairman of the day of the said Board, and one C. D., and one E. F., to wit, two paid officers, to wit, two Guardians, then present at said Board," &c., allowed the rate.

In an action against an immediate lessor for poor's rate, the plaintiffs were stated to be "the Guardians of the poor of Ballinrobe Union." In a similar action the plaintiffs were stated to be "the Guardians of the Poor of Castlebar Union." *Semble* in the former case, and *Held* in the latter, that the description of the plaintiffs' title to sue was sufficient.

In an action against an immediate lessor for poor's rate, it is not necessary to state the respective numbers (as appearing in the rate-book) of the several rateable hereditaments in describing them, generality of statement in this respect being admissible, as the defendant may obtain all necessary information on the subject from the rate-book.—*Semble* in this case, *Held* so in *Castlebar Union v. Browne* (*infra*, in *notis*.)

A count, in an action against an immediate lessor for poor's rate, stated that the defendant became liable to pay the amount of the said rate so remaining due and unpaid as aforesaid by the defendant in respect of the said hereditaments, situate, &c., for which respectively he as such immediate lessor was by virtue of a certain Act of Parliament "in due form of law rated as aforesaid." Whether this referential averment, in the absence of any other allegation, that the defendant was rated, is sufficient, *Quære*? A special demurrer to this count, assigning as cause of demurrer that the count did not state "how or in what manner the rate was imposed, or how the defendant is liable to the said rate," was held not to point out with requisite precision the insufficiency of the above referential averment.

\* 1 & 2 *Vic.* c. 56.

† 6 & 7 *Vic.* c. 92.

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"Acts, and before the commencement of this suit, to wit, on the 15th  
"of October A. D. 1847, to wit, at Ballinrobe, in the Ballinrobe Union  
"aforesaid, in the county aforesaid, the said plaintiffs, then and there  
"being the Guardians of the Poor of the Ballinrobe Union aforesaid,  
"at a certain meeting by them and there duly holden under the afore-  
"said Acts of Parliament, did, according to and in pursuance of the  
"said Acts occasioning and requiring them so to do, duly make a  
"certain rate in and for certain Electoral Divisions of the said  
"Union, to wit, for the Electoral Divisions of Mayo, Robeen, Ballin-  
"dine and Claremorris respectively; and the said Guardians the  
"plaintiffs then and there made the said rates in manner as afore-  
"said, for and upon the said Electoral Divisions as aforesaid, for  
"defraying the necessary expenses incurred in the execution of  
"the said Acts, upon the several parties liable under the provisions  
"of the said Acts to be rated towards the said rate in respect of the  
"several rateable hereditaments in the said Electoral Divisions of the  
"said Union: that is to say, according to the provisions of the said  
"Acts, upon the tenants or occupiers of all the said rateable heredi-  
"taments whereof and in respect whereof the immediate lessors  
"were not liable to be rated towards the said rates respectively,  
"instead of the occupiers thereof, and upon the immediate lessors of  
"all the said rateable hereditaments whereof and in respect whereof  
"the immediate lessors were liable to be rated towards the said rates  
"respectively, instead of the occupiers thereof, to wit, at Ballinrobe  
"aforesaid; and the said Guardians the plaintiffs aforesaid, in making  
"in manner and form as last aforesaid the said rates, then and there  
"had due regard to the amount which had been duly ascertained to  
"be chargeable upon each respectively of the said Electoral Divisions  
"of the said Union in respect of its proportions of the expenses  
"incurred in carrying into execution the provisions of the said  
"Acts; and the said Guardians the plaintiffs aforesaid did then  
"and there, at the time aforesaid in this behalf mentioned, to wit,  
"on the 15th of October 1847, to wit, at Ballinrobe aforesaid, in  
"manner and form aforesaid, and according to and in pursuance of  
"the said Acts, make in and for the Mayo Electoral Division of the  
"said Union a certain rate (said rate being a poundage rate) of three

"shillings for every pound of the net annual value of the several  
"rateable hereditaments situate in the said Mayo Electoral Division."

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Here followed similar averments with respect to the making of a poundage rate for the Electoral Divisions of Robeen, Ballindine and Claremorris respectively. The declaration then proceeded thus:  
"And the said plaintiffs say, that at the time of the making of  
"the said rate, and before signing the same, the said Guardians  
"the plaintiffs aforesaid, then and there, to wit, on the 15th day  
"of October 1847, to wit, at Ballinrobe aforesaid, did duly carry  
"into, and mark and charge *as arrears* in the rate books respectively  
"for that purpose provided (in which the said rates, according  
"to the form by the said Commissioners in that behalf prescribed,  
"were particularised, set forth and detailed), the several sums of  
"money that then and there remained unsatisfied of and from  
"former rates theretofore duly made in and for the said Electoral  
"Divisions of the said Union respectively, and did then and there  
"duly charge *as arrears* the said sums respectively to each of the  
"parties, and in respect of each of the rateable hereditaments  
"respectively, who then and there were liable to pay the same;  
"and the said Guardians having then and there duly entered and set  
"forth in the said rate-books respectively the said rates and *arrears*  
"*of rates* respectively in and for the said Electoral Divisions of the  
"said Union, one David Kelly, who was then and there the clerk of  
"the said plaintiffs, did then and there, at the foot of the said rates  
"respectively, certify that the said rates, in so far as the value of the  
"hereditaments therein assessed was concerned, were in conformity  
"with the valuation of and for the said Electoral Divisions respect-  
"ively in force for the time being. And the said plaintiffs further  
"aver, that after said rates were so certified as aforesaid, to wit,  
"on the day and year last aforesaid, a Board of the said Guar-  
"dians, at the said meeting hereinbefore mentioned, did then  
"and there adopt the said rates, and that one William Robert  
"Leckey, to wit, a paid officer who was then and there the Chair-  
"man of the day of the said Board, and one Arthur Thomas and  
"one William Cary, to wit, two paid officers, to wit, two Guardians  
"then present at said Board, did then and there state at the

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"foot of the said rates respectively that they allowed the same,  
"and did then and there sign the said allowance, to wit on the  
"15th day of October 1847, to wit, at Ballinrobe aforesaid.  
"And the said plaintiffs say, that after the making of the said  
"rates as aforesaid, and before the making the demand next  
"hereinafter mentioned, the said Guardians the plaintiffs aforesaid  
"did in due form of law, and in such form and in manner as are  
"and then and there were in and by the said Commissioners in  
"that behalf directed, duly publish within the said Electoral Divi-  
"sions of Mayo and Robeen respectively, to wit, on the 20th day  
"of October 1847, notices of the said rates respectively having been  
"made and the rate of poundage thereof, and did then and there  
"cause such notices of and for the said Electoral Divisions to be  
"posted on every church, chapel and other place of public worship,  
"and at all usual places of giving such public notice, within each of  
"the said Electoral Divisions respectively; and after the publication  
"of the said notices, and thence hitherto, the said rates and rate-  
"books in which the said rates and *arrears of rates* were and are  
"duly contained and set forth and detailed, have been and are at all  
"reasonable times, to wit, from the hour of ten o'clock in the fore-  
"noon to four o'clock in the afternoon on every day except Sunday,  
"duly open for any person or persons affected thereby to inspect  
"the same and take copies thereof or extracts therefrom without  
"paying any thing for the same, to wit, at Ballinrobe aforesaid.  
"And the said plaintiffs further say, that at the time of the making  
"said rates so duly made as aforesaid, in and for the said Electoral  
"Divisions of the said Union, the name of the immediate lessor of  
"the several rateable hereditaments hereinafter mentioned (situate  
"within the said Electoral Divisions of the said Union respectively),  
"then and there not being accurately known to the persons making  
"the same, the said defendant, who was and still is the immediate  
"lessor of the said rateable hereditaments hereinafter mentioned,  
"under and and by virtue of the provisions of the said Act so made  
"and passed in the seventh year of her present Majesty, is therein  
"and by the said rates described as the immediate lessor of the said  
"rateable hereditaments respectively, without any name or further

“addition ; and the said rates so then and there duly made in and  
 “for the said rateable hereditaments hereinafter mentioned were  
 “then and there, and thereby and in manner aforesaid, and under  
 “and by virtue of the provisions of the said Act herein last before  
 “mentioned, in due form of law made on him the said defendant, he  
 “then and still being the immediate lessor so rated as aforesaid,  
 “the net annual value of the whole of the rateable hereditaments  
 “in the said Union occupied by each of the persons respectively  
 “occupying each of the said rateable hereditaments hereinafter  
 “mentioned, so then and there rated as aforesaid, not exceeding  
 “£4, to wit, of the value of £3 ; and each of the said persons  
 “respectively then and there and still being tenant from year to  
 “year, and then and there having no greater estate or interest  
 “therein than such tenancy from year to year, and the said rate so  
 “duly made as aforesaid in respect of the said rateable heredita-  
 “ments hereinafter in this behalf mentioned, so occupied by the  
 “said persons respectively as aforesaid, was and is, in pursuance  
 “of the last-mentioned Act, rated to and made on the immediate  
 “lessor of such persons respectively ; that is to say, was and is in  
 “the manner and form as aforesaid rated to and made on the said  
 “defendant, he then and still being the immediate lessor so rated as  
 “aforesaid, to wit, at Ballinrobe aforesaid, in the county aforesaid.  
 “And the said plaintiffs in fact say, that in and by the said rate so  
 “duly made as aforesaid, in and for the said Mayo Electoral Division  
 “of the said Union, to wit, on the 15th day of October 1847, to  
 “wit, at Ballinrobe aforesaid, the said defendant was and is rated  
 “as immediate lessor of the several rateable hereditaments next  
 “hereinafter mentioned, situate in the said Mayo Electoral Division  
 “of the said Union, and herein designated and described by certain  
 “numbers ; and each of the said numbers so hereinafter mentioned,  
 “and now hereby declared as intended to describe the same, is the  
 “number by and with which each of the said hereditaments respec-  
 “tively is marked, numbered and described in the said rate-book  
 “containing the said rate so duly made as aforesaid, in and for the  
 “said Mayo Electoral Division, to wit, on the 15th of October 1847,  
 “to wit, at, &c., aforesaid ; that is to say, the rateable hereditaments

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"designated in the said rate-book as, to wit, numbers 295, 296, 299, &c., &c. [specifying them], respectively situate at Gervel, in said Mayo Electoral Division; and numbers 734, 737, &c., respectively situate at Knockrickard in said Mayo Electoral Division. And the said plaintiffs say, that in and by the said rate herein last before mentioned, and for and in respect of the said hereditaments so designated and mentioned as aforesaid, the said defendant as such immediate lessor as aforesaid is indebted to them the said plaintiffs in a large sum of money, to wit, the sum of £10. And the said plaintiffs in fact say, that"—[Here followed similar separate averments of the liability of the defendant as immediate lessor of certain rateable hereditaments in the Electoral Divisions of Robeen, Ballindine and Claremorris respectively, as designated by numbers in the rate-book—the amount of rate claimed in respect of those divisions were three sums of £10, £10 and £20: the declaration thence proceeded thus]:—"All which said several sums respectively hereinbefore mentioned as due and owing to the said plaintiffs by the said defendant as such immediate lessor as aforesaid, for and on account of the said Electoral Divisions of the said Union respectively, and for and in respect of the said several hereditaments hereinbefore mentioned, were not, nor was any or either of them, or any part thereof, paid or satisfied to the said plaintiffs since the said rates respectively were made and the same became payable as aforesaid. And the said plaintiffs say, that after the same were made and became payable as aforesaid, to wit, at Ballinrobe aforesaid, in the county aforesaid, payment of the said several sums hereinbefore mentioned was duly demanded from the said defendant, to wit, by the person duly appointed collector, and then and there duly authorised to receive and collect the rates and *arrears of rates* in and for the several Electoral Divisions of the said Union respectively; but the said defendant did not, when the said sums were so demanded as aforesaid, nor at any other time, pay the same, or any or either of them, or any part thereof, but therein made default; whereby and by reason of the premises, and by force of the statutes hereinbefore mentioned and in such case made and provided, the defendant became liable to pay to the plaintiffs a

“large sum of money, to wit, the sum of £50 of lawful money, being  
 “the amount of the said rates and arrears of rate so remaining due  
 “and unpaid as aforesaid; whereby and by force of the said statutes  
 “an action hath accrued to the plaintiffs to have and demand of and  
 “from the said defendant the said sum of £50, part of the said sum  
 “of £100 above demanded.”

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The second count was as follows:—“And whereas the said  
 “defendant heretofore, to wit, on the 1st day of April A.D. 1848,  
 “to wit, at Ballinrobe aforesaid, in &c., was indebted to the said  
 “plaintiffs as such Guardians aforesaid, suing by and with such  
 “consent of the Poor law Commissioners as aforesaid, in a certain  
 “other sum, to wit, the sum of £10 for a poor-rate, duly made  
 “pursuant to the said statutes, in and for the Mayo Electoral Divi-  
 “sion of the said Ballinrobe Union in the county aforesaid, to wit,  
 “on the 15th day of October A.D. 1847, to wit, at Ballinrobe afore-  
 “said; and which said rate was duly published within the said  
 “Electoral Division, to wit, on the 20th day of October 1847, which  
 “said rate in due form of law was made and published as aforesaid  
 “for and in respect of certain, to wit, fifty rateable hereditaments  
 “situate in the said Mayo Electoral Division of the said Union, of  
 “which the said defendant at the time of making and publishing  
 “said rate respectively was, and still is, the immediate lessor; which  
 “said rateable hereditaments at the time of the making the said  
 “rate were, and still are held and occupied by sundry, to wit,  
 “fifty occupiers holding the same as immediate tenants of the said  
 “defendant respectively, each of such occupiers then and there  
 “being tenant from year to year, and then and there having no  
 “greater estate or interest than such tenancy from year to year;  
 “and the net annual value of the whole of the rateable heredita-  
 “ments occupied in the said Union by each of such occupiers  
 “respectively then and there not exceeding £4, to wit, of the value  
 “of £3, in respect whereof the said defendant as such immediate  
 “lessor as aforesaid is so indebted in the said sum of £10 for the  
 “said poor-rate duly made as aforesaid in and for the said Mayo  
 “Electoral Division, to wit, on the 15th of October 1847, to wit, at  
 “&c., aforesaid; which sum hereinbefore in this Court mentioned as

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 THE GUAR- “immediate lessor as aforesaid, for and on account of the said rate  
 DIANS OF “herein last before mentioned, was not, nor was any part thereof  
 THE POOR “paid or satisfied to the said plaintiffs since the said last mentioned  
 OF BALLIN- “rate was so duly made and published and the same became payable,  
 ROBE UNION “to wit, at Ballinrobe aforesaid, in &c., aforesaid. And the said  
 v. “plaintiffs say, that after the same so became payable as aforesaid,  
 BROWNE. “to wit, on the 25th day of March A.D. 1848, to wit, at &c., in  
 “&c., aforesaid, payment of the said sum herein last before men-  
 “tioned was duly demanded from the said defendant by the person  
 “duly appointed collector, and then and there duly authorised to  
 “receive and collect the rate and arrears of rate in and for the said  
 “Mayo Electoral Division of the said Union; but the said defendant  
 “did not when the said sum was so demanded as aforesaid, nor at  
 “any time, pay the same or any or either of them, or any part  
 “thereof, but therein made default; whereby and by reason of the  
 “premises, and by force of the statutes hereinbefore mentioned,  
 “and in such case made and provided, the said defendant became  
 “liable as such immediate lessor to pay to the plaintiffs a large sum  
 “of money, to wit, the sum of £10 of lawful money, being the  
 “amount of the said rate so remaining due and unpaid as aforesaid  
 “by the said defendant for and in respect of the said hereditaments  
 “situate in the said Mayo Electoral Division, for which respectively  
 “the said defendant as such immediate lessor was, in virtue of the  
 “provisions of the said Act so made and passed in the seventh year  
 “of the reign of her present Majesty, in due form of law rated as  
 “aforesaid; and thereby and by force of the said statutes an action  
 “hath accrued to the plaintiffs to demand and have of and from the  
 “said defendant the said sum of £10, part of the said sum of £100  
 “above demanded.”

The third, fourth and fifth counts respectively proceeded for the several sums of £10, £10 and £20 for rates due in the Electoral Divisions of Robeen, Ballindine and Claremorris, and were similar to the second count.

To the foregoing declaration the defendant filed this demurrer:—  
 “And the said defendant, by &c., comes and defends, &c., and

“saith that the said declaration, and the matters therein contained  
 “in manner and form as the same are above stated and set forth, are  
 “not sufficient in law for the said plaintiffs to have or maintain  
 “their aforesaid action thereof against the said defendant; and this  
 “he is ready to verify—[prayer of judgment]; and the said defendant,  
 “according to the form of the statute in that case made and pro-  
 “vided, states to the Court here the following causes of demurrer to  
 “the first count of the said declaration, that is to say”—

First—\* That the said first count is multifarious and combines distinct causes of action, and seeks to recover distinct rates for separate Electoral Divisions, and avers the liability of the defendant to pay several distinct sums of money to the plaintiffs in distinct and different rights, whereas the right of the plaintiffs to each separate rate, and the alleged liability of the defendant to pay the separate rates for the different Electoral Divisions, form distinct causes of action, and the said several alleged rates should not be united in the said first count.

Secondly—That it does not appear by the said first count how or in what right, or under what title the plaintiffs are entitled to the sums claimed; and though it is stated that the plaintiffs did duly carry into and make and charge as arrears in the rate-books provided for the purpose in which the rates, according to the form prescribed by the Commissioners, were particularly set forth, the several sums of money that then remained unsatisfied of and from former rates theretofore made in and for the said Electoral Division, it is not shown when, where or how said alleged former rates were charged, or that the said Guardians had any authority to enter said arrears in the rate-books, nor how the defendant became legally liable to pay the rates and arrears in the first count mentioned.

Thirdly—That the said first count states that one William Robert Lecky, a paid officer who was then and there the Chairman of the day of the Board, and one Arthur Thomas and one William Carey, to wit, two paid officers, to wit, two Guardians then present at the Board, stated at the foot of the said rates that they allowed the

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\* This part of the demurrer has been somewhat abridged, the substance of it is however preserved, and sufficient of the form for all purposes of utility.

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same and signed the said allowance. But that it is not stated that the Board of Electoral Guardians had been dissolved or had ceased to exist, or to act as Guardians, or what authority the persons styled and called paid officers had to allow or charge said rate, nor when, how, by whom or under what circumstance, or for what term said persons so styled "paid officers" were appointed such paid officers, nor how or in what manner they were entitled to act as Guardians, or to make or claim said rate, and that it was uncertain whether they were in fact paid officers or elected Guardians.

Fourthly—Uncertainty in the said first count in the description of the rateable hereditaments and of the defendant's liability in respect thereof, and uncertainty in the same count as to the rateable hereditaments on which the arrears are charged.

Fifthly—The omission in the said first count to aver the publication of notices of rates with respect to all the Electoral Divisions except Mayo and Robeen (with respect to which it was averred).

Sixthly—Vagueness and uncertainty in the averment in the said first count of defendant's liability to the rates and arrears, and omission in the said first count to state whether the consent of the Commissioners was in writing, or how or when it was given, or that the Commissioners were duly empowered in that behalf.

Seventhly—Repugnancy, insensibility, &c., in said first count, and that it does not thereby appear what title the plaintiffs have to maintain the action, nor whether they sue as elected Guardians or as paid officers.

"The demurrer then proceeded thus:—"And the said defendant, "according to the form of the statute in such case made and provided, shows to the Court here the following causes of demurrer "to the said second, third, fourth and fifth counts of the said declaration, that is to say"—

First—That none of those counts disclosed any sufficient cause of action, or showed when, how, or by what authority the rates or arrears in said last-mentioned counts were made.

Secondly—That the last mentioned counts referred in divers particulars to the first count, and were severally incomplete in themselves respectively.

Thirdly—The omission in the last mentioned counts "to state

"how or by whom, or in what manner the several rates in those counts were imposed, or how the defendant is liable to said rates respectively, or to any of them," or upon what rateable hereditaments the said several rates were imposed; and the omission to describe by number or otherwise the hereditaments in respect of which said several rates are respectively claimed in those counts.

Fourthly—The omission in those counts to state who the persons were who demanded the rates, and by whom they were authorised so to do.

The last cause of demurrer was:—"And for that the commencement of said declaration is a departure from the usual form, and is vague and unintelligible, and the said declaration is in other respects uncertain, informal, insufficient and soforth."

*Dix*, with whom was *Mountifort Longfield*, for the defendant.

We believe this to be the first instance of an action brought to recover poor's rate. In England such an action cannot be maintained, there being a special remedy prescribed by statute: *Chitty's Burn's Justice*, p. 352; for it is a rule, that where a statute creates a claim, and points out a particular remedy for its enforcement, no other can be resorted to: *per* Denison, J., in *Stevens v. Evans* (a), and *per* Alexander, C. B., in *Underhill v. Ellicombe* (b). For the same reason\* no such action could have been maintained

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To an action for poor's rate, brought under the statute 6 & 7 Vic. c. 92, in one of the Superior Courts against an immediate lessor, the consent of the Commissioners, who, at the institution of the action, are entrusted with the chief

administration of the Laws for the Relief of the Poor in Ireland, must be averred in the declaration, such consent being a condition precedent to the bringing of the action. It is not necessary that the consent should be given under the seal of the Board.

The declaration (filed in June 1848) in such an action, after referring to the statutes 1 & 2 Vic. c. 56, and 6 & 7 Vic. c. 92, stated that the Guardians sued "by and with the consent of the Poor-law Commissioners," but made no reference to the stat. 10 & 11 Vic. c. 90 (passed 22nd July 1847), which recites that their commission would expire at the end of the Session of Parliament next after the 31st July 1847, and which authorises the appointment of certain persons as "Commissioners for administering the Laws for Relief of the Poor in Ireland." Held, on special demurrer, that the consent was sufficiently pleaded, there being nothing before the Court to show when the authority of the former Commissioners had terminated, or that of the latter commenced.

(a) 21 Bur. 157.

(b) M'Cl. & Yo. 455.

\* The first Act for the Relief of the Poor in Ireland, 1 & 2 Vic. c. 56, s. 73, directed that rates imposed thereunder should be levied in the same manner as county cess—viz., by distress and sale of goods. Where the rate is two months in arrear, sec. 78 gives further remedies. For the mode of levying county cess, see 6 & 7 W. 4, c. 116, s. 152.

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first section of which transfers the liability for rates from occupiers of rateable property not exceeding £4 in annual value, to their immediate lessors. The 2nd section, amongst other remedies for the recovery of the rate from immediate lessors, gives an action in the name of the Guardians of the Union against such lessors in any of the Superior Courts; but provides that no such action shall be brought in those Courts without the consent of the Poor-law Commissioners. Moreover, the plaintiffs having in the first count undertaken to show specially how they are entitled to sue, must do so in the strictest manner (*per Curiam* in *Crouther v. Oldfield* (a), *Bristow v. Wright* (b), and 1 *Wms. Saund.* p. 346 a., n. 2, and 2 *ibid* 206, n. 22), averring compliance with all the requisite forms ordained by the statutes, both as to the imposition, &c., of the rate and the bringing of the action. The declaration states that the plaintiffs sue "by and with the consent of the Poor-law Commissioners." We say that consent has not been properly pleaded, and must therefore be considered as unalleged; such an averment is indispensable. The devisee of a chattel real must aver in pleading that he entered into the land with the consent of the executor: 1 *Wms. Saund.* pp. 280, 280 e, n. 5.—[BALL, J. That is not a case under a statute.]—It has been held that the assignees of a bankrupt must show that a suit by them was commenced with the consent of creditors pursuant to 11 & 12 G. 3, c. 8: *Stokes v. Deey* (c); *Ockleston v. Benson* (d); *King v. Tullock* (e). The insufficiency of the averment here appears thus:—The declaration refers to two statutes only, viz., 1 & 2 Vic. c. 56, and 6 & 7 Vic. c. 92. By 1 & 2 Vic. c. 56, s. 118, the Poor-law Commissioners for England and Wales appointed under 4 & 5 W. 4, c. 76, are pointed out as the Commissioners for carrying the former Act (1 & 2 Vic. c. 56) into execution, by the style of "The Poor-law Commissioners." By 6 & 7 Vic. c. 92, s. 2, it is provided "That no

(a) 1 Salk. 365.

(b) 2 Doug. 665.

(c) 1 Mol. 597; S. C. Beatty, 152.

(d) 2 S. &amp; St. 265.

(e) 2 Sim. 469.

“action shall be brought in any of the Superior Courts of Record  
 “in Dublin without the consent of the Poor-law Commissioners.”  
 This must mean the Commissioners for the time being. But by the  
 10 & 11 Vic. c. 90, the administration of the Poor-laws in Ireland  
 has been taken from the Commissioners appointed by 1 & 2 Vic. c. 56,  
 and conferred upon other persons, who are to be styled “Commis-  
 sioners for administering the Laws for Relief of the Poor in Ireland.”  
 Now, the consent of these latter Commissioners has not been averred.  
 Nay more, even their existence and that of the statute by which  
 they have been created is ignored by the declaration. The former  
 Commissioners may still exist as such in England and Wales ; but  
 even so, they are as distinct a body from the present Commissioners  
 in Ireland as the Corporation of Dublin is from that of Waterford.  
 For aught here apparent to the contrary, the older body may have  
 usurped the powers of the latter Commissioners. The consent  
 moreover should have been averred to have been under the seal of  
 the Board: 1 & 2 Vic. c. 56, s. 121 ; 10 & 11 Vic. c. 90, ss. 3, 17, 18.

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In *Jones v. Yates* (a), consent to the institution of a suit under  
 the Bankrupt Act was held to be unnecessary. To the same effect  
 would seem the remark of Bayley, B., in *Doe v. Evans* (b).—  
 [BALL, J. The statute there referred to was only directory, here it  
 is mandatory. Have you any law case dispensing with consent  
 where negative words are used as in this statute?—DOHERTY, C. J.  
 Does not the Legislature appear to have desired that there should  
 be great caution exercised in bringing such suits as the present, and  
 accordingly to have rendered the consent of the Commissioners a  
 condition precedent?—At all events the consent as averred is suf-  
 ficient, for there is nothing to show that the Commissioners under  
 10 & 11 Vic. c. 90, have entered upon their office, and that the  
 authority of the former Commissioners had terminated before the  
 commencement of this suit.

(a) 2 Sim. 470, *note*.

(b) 1 Cr. & M. 457.

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I think that to be a sufficient answer to this objection. We have upon the record the fact that the declaration was filed in June 1848, and there is nothing upon it to show that the authority of the Commissioners under 1 & 2 Vic. c. 56, had expired or was determined before that time, nor have we any judicial knowledge as to when it was determined. In reality I believe that the new Commissioners did not come into office until September last.

DOHERTY, C. J.

We cannot do otherwise than hold that the statute 6 & 7 Vic. c. 92, imperatively imposes upon all persons bringing such actions as the present the necessity of obtaining the previous consent of the Commissioners who, at the time of the institution of the action, may be entrusted with the chief administration of the Poor-laws, and that it was indispensably requisite for the plaintiffs to aver in their declaration that such a consent had been obtained. They have alleged a consent of the Poor-law Commissioners; but the sufficiency of that consent has been impeached, because it is said that by the 10 & 11 Vic. c. 90, a new class of Commissioners has been created under the name of "The Commissioners for administering the laws for Relief of the Poor in Ireland," to which statute and to which Commissioners no allusion has been made by the declaration. We believe that the pleader has overlooked that statute; but as there is nothing apparent on the pleadings or otherwise which brings to our judicial notice that the authority of the former Commissioners had terminated before the commencement of this suit, the consent as alleged is in our opinion *prima facie* sufficient. I may add that we do not consider it to have been necessary for the plaintiffs to show or aver that the consent of the Commissioners should have been given under their seal.

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*Dix and Longfield.*

The next objection to the first count is, that the plaintiffs proceed for arrears of rates as well as for rates, and do not show the liability of the defendant as immediate lessor or otherwise for such arrears. The count alludes vaguely to the arrears of former rates as having been entered and charged in the rate-book against the proper parties, but does not show who those parties are, or that the defendant is one of them, or in respect of what former rate those arrears have accrued. The arrears sought may have been arrears of rates which, even granting them to be due, yet may be recoverable only under 1 & 2 Vic. c. 56, and not by action in the Superior Courts under 6 & 7 Vic. c. 92, an Act which is prospective only.

*O'Donel and Napier.*

We are not going for arrears, but for the sums due by the defendant as immediate lessor in respect of the rate last imposed previously to the commencement of this suit, and we have described those sums in the same manner as they are described in the rate-book made in conformity with the 10th section of the 6 and 7 Vic. c. 92.—[JACKSON, J. If you mean that you do not intend at the trial to make a claim for arrears of bygone rates, that is not sufficient; I think that you must argue either that the declaration clearly shows your title to such arrears or that it does not go for them at all; and to establish this latter position it devolves upon you to convince us that the word "arrears" is used synonymously with "rates," and does not mean arrears of by-gone rates.]—The declaration limits the defendant's liability to the rate made upon the 15th of October 1847, and although it states that the Guardians carried into and charged in the rate-book the sums of money remaining unsatisfied in respect of former rates, yet it only says that those sums were charged as arrears to each of the parties who were liable to pay the same, and does not aver or fasten any liability upon the defendant in particular to pay arrears of former rates. The statements therefore which

The argument on one point of a demurrer having terminated, the Court refused, with respect to that point at least, to listen to an objection, then first made, that the demurrer was too large. But that objection was afterwards allowed to prevail with respect to the subsequently argued points of demurrer.

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In an action brought by the Guardians of a Union against an immediate lessor, one count proceeded for "rates and arrears of rate," and contained language tending to show that by "rates" were meant sums due in respect of the most recently imposed rate, and by "arrears of rate" were meant sums due in respect of by-gone rates. The plaintiffs having shown a right to sums due in respect of the most recently imposed rate only, *Held* on special demurrer, that the count was bad, and that the Court could not construe "rates" to be synonymous with "arrears of rate;" the plaintiffs by their pleading having affixed to those expressions distinct meanings.

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there may be in regard to such arrears will be treated as surplusage.—[JACKSON, J. The plaintiffs take the distinction between “rate” and “arrears of former rate.” We must do so too. Suppose a bill of particulars required and given, would not the plaintiffs in it be entitled to claim sums due in respect of arrears of by-gone rates? To maintain a demand for such arrears, should not there have been an averment that they accrued due subsequently to the passing of the 6 & 7 Vic. c. 92?—In this action the whole sum (£100) sought to be recovered will be found to be exactly absorbed by the smaller sums £10, £20, &c., when added together. All the sums must, upon demurrer, be taken to be truly alleged; and it will be seen that the smaller sums are entirely appropriated to the rate imposed upon the 15th of October 1847, in respect of the various Electoral Divisions in which the defendant’s liability as immediate lessor is shown. Hence it clearly appears that we do not claim any arrear of by-gone rate.

*Longfield*, in reply.

Monies due in respect of a rate do not become “an arrear” until another rate has been made. The last averment in the first count furnishes a conclusive argument against the plaintiffs. There they claim £50 “being the amount of the said rates and arrears of rate so remaining due and unpaid as aforesaid.” What are the said arrears of rate? of course the only arrears before alluded to, viz., arrears of former rate stated to have been charged in the rate-book, and to the payment of which our liability has not been established. Could the defendant have safely allowed judgment to go by default? If he had done so, he might have been held liable for rates which were not due by him as immediate lessor.

Counsel for the plaintiffs, when the argument on this point had terminated, was proceeding to object that the demurrer was too large. But the Court thought the objection too late to prevent them from giving judgment on this point (as to the arrears) at all events.

*Cur. ad. vult.*

*Dix* proceeded to argue the other points.

The next objection to the first count is, that although it avers a publication of notice of the rate having been made in Mayo and Robeen, it has omitted to allege any such publication in the other Electoral Divisions. The 70th section of 1 & 2 Vic. c. 56, requires such a publication.

*O'Donel.*

The 71st, 73rd and 78th sections of the same Act, which create the liability for rate and direct its collection, in no way allude to the necessity of prior publication.—[BALL, J. The 71st and 73rd sections speak of rates “made under the authority of this Act.” Could a rate be said to have been made under the authority of this Act, if notice of it were not published in compliance with the 70th section?—Even admitting proof of such publication to be necessary at the trial, it does not follow that we should aver it in the declaration.—[BALL, J. I am not prepared to say that I can assent to that proposition.]—At all events the demurrer is too large; we have averred publication in Mayo and Robeen; and so far, therefore, in this respect the first count is good. The demurrer should have been confined to that part of the count which goes for rates due in the other Electoral Divisions; the demurrer was so limited in *The Dean and Chapter of Bristol v. Guyse* (a).

*Longfield*, in reply.

A count which is bad in part is bad in the whole.—[JACKSON, J. The count is divisible; it proceeds for separate rates.]—The defendant thinking that he had ground of objection to the whole of the count, demurred to it; and then thinking that he had further objections to different parts of it, he mentions them singly.

tion containing several counts commenced thus:—“And the defendant, by, &c., comes, &c., and saith that the said declaration, and the matters therein contained in manner and form as the same are above stated, are not sufficient in law;” and then proceeded to assign causes of demurrer to each count separately. *Held*, that as some of the counts (*Semle*) were good, the demurrer was too large and must be overruled accordingly.

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A count in an action for poor's rate due in four Electoral Divisions of the Union averred, as to two of those Electoral Divisions, publication of notice of the rate having been made, but omitted to aver such publication as to the two other Electoral Divisions; *Semle*, that the count was bad in regard to the two latter Electoral Divisions. *Held*, however, that the cause of action being divisible, the demurrer should have been confined to the bad part of the count; and that having been aimed at the whole count, the demurrer must be overruled as too large.

A demurrer to a declara-

(a) 1 Saund. Rep. 108.

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You have objected to the entire count, which can only be said to be bad on the ground now put forward with respect to two of the Electoral Divisions. The cause of action is clearly divisible; you should have pointed your demurrer to the bad part only.

On the ground that it is too large, we overrule the demurrer, so far as it complains of non-publication of notice of the rate having been made.

In an action for poor's-rate, brought against an immediate lessor by the Guardians of the Union, the plaintiffs may combine in one declaration, or in one count of it, claims for rate due from the defendant in respect of several Electoral Divisions of that Union. *Semble*, in this case, and so *Held* in *Castlebar Union v. Browne* (*infra*, in *notis*.)

*Dix* and *Longfield* objected to the first count, inasmuch as it combined several distinct causes of action.\* Neither the ratepayers or paupers of one Electoral Division are interested in the other Electoral Divisions. The Guardians stand in a distinct fiduciary situation to each Electoral Division, and cannot therefore join either in one count, or even in one action; they are here endeavouring to sue in different rights. An executor cannot join a claim in his own right with one in his right as personal representative.—[JACKSON, J. Or suppose a man executor to several persons, he could not join demands in the several rights.—BALL, J. This objection seems to rest much upon the same footing as that of multifariousness in a bill in equity, in which however, although there may be several demands, yet unity of title in the plaintiffs is considered a sufficient answer to the objection.]

*O'Donel* and *Napier*.

The objection that the plaintiffs have combined in one suit several distinct demands in respect of different Electoral Divisions is limited by the demurrer to the first count, and therefore must be confined to it in argument. It fails as to that count, duplicity not being any good ground of objection to a count: *Shepherd v. Shepherd* (a). Independently of this answer, we say that although the

(a) 1 Man. Gr. & Sc. 849.

\* On the following day this objection was made in a similar case, *The Guardians of the Poor of Castlebar Union v Browne*, in this Court, but was unanimously disallowed.

demands may be different, yet the title of the plaintiffs is the same, and they do not stand in a distinct fiduciary situation with respect to each Electoral Division. For many general purposes of the entire Union they may levy a rate which would fall equally on all the Electoral Divisions. And we have averred generally that the rate was made for the purpose of meeting expenses incurred under 1 & 2 Vic. c. 59, and 6 & 7 Vic. c. 92. In *Cortis v. The Kent Waterworks Company* (a) several rates were proceeded for jointly. At all events, we dispose of this objection by showing that the demurrer is too large, it being to the whole declaration. Where a demurrer commences thus, "And the defendant, &c., says that the said declaration is insufficient in law," and then proceeds to assign separate causes of demurrer to each count of the declaration, it is in form a demurrer to the whole declaration; and if any count be good, the plaintiff is entitled to judgment, the demurrer being too large: *The Parrett Navigation Company v. Stower* (b).

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*Longfield*, in reply.

To the case of *Hinde v. Gray* (c) there is a note by Sergeant *Manning* which proves that the system of overruling demurrers as being too large was imported from Courts of Equity, and has no foundation in law. That note has been approved of by Parke, B., in 1842, in *Briscoe v. Hill* (d), and again in 1845, in *Slade v. Hawley* (e). In the former of these cases he says:—"Take, for instance, the case of a general demurrer to two counts, one of which is good and the other bad, the plaintiff ought to have judgment on the good count, and not on the other; in short, the Court should look at the whole record and see what is the proper judgment to give upon the whole." Counsel also mentioned *Byrne v. O'Flaherty* (f).

The judgment of the Court upon these points was withheld until the conclusion of the argument upon the whole case.

(a) 7 B. & C. 314.

(c) 1 Man. & Gr. 201.

(e) 13 M. & W. 760.

(b) 6 M. & W. 564.

(d) 10 M. & W. 741.

(f) 6 Ir. Law Rep. 90.

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*Dix.**Common Pleas.*

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In a count for poor's rate, *Semble*, in this case, and *Held*, in *Castlebar Union v. Browne* (infra, in notes), that the parties who allowed the rate, and their authority to do so (under 6 & 7 Vic. c. 92, s. 10), were sufficiently set forth by an averment, "that one A B, to wit, a paid officer, who was then and there the Chairman of the day of the said Board, and one C D and one E F, to wit, two paid officers, to wit, two Guardians then present at said Board," &c., allowed the rate.

It does not appear that the parties in the first count alleged to have allowed the rate (as required by 6 & 7 Vic. c. 92, s. 10) had any authority so to do. The plaintiffs do not show that the Elective Guardians had ceased to exist as such, and that "paid officers" had been duly substituted for them.—[JACKSON, J. The fluctuations amongst the members of a body such as a Board of Guardians does not alter the identity of that body. Paid officers becoming Guardians by appointment seem to be no less Guardians than persons elected to the office.]—Persons falling under the denomination of "paid officers" may, for many purposes contemplated by the Acts for Relief of the Poor, be co-existent with Elective Guardians, and yet have no power either to make or allow a rate: 1 & 2 Vic. c. 56, s. 31.\*

*O'Donel.*

We have followed the words of the Act 6 & 7 Vic. c. 92, s. 10, in averring that "one William Robert Lecky, to wit, a paid officer, who was then and there the Chairman of the day of the said Board, and one Arthur Thomas and one William Carey, to wit, two paid officers, to wit, two Guardians then present at said Board," &c., allowed the rate. The fact of the demurrer being too large, as insisted upon by us with respect to the point last argued, if admitted by the Court, will dispose of this objection also.

*Dix*, in reply.

Even supposing that so far as the averment relates to the allowance of the rate by William Robert Lecky it is properly made, yet the other two persons are only described under two *scilicets*, which if struck out leaves those gentlemen without any allegation of title, and if retained we must take the first as their proper description, viz., "paid officers;" and then they are equally without title, it not being shown how, as such, they are authorised to allow a rate, or

\* This objection was upon the following day made by the same Counsel in this Court in an exactly similar case, *The Guardians of the Castlebar Union v. Browne*, and was unanimously disallowed.

that the Elective Guardians were then extinct. The Act requiring that the allowance should be made not only by the Chairman of the day but also by two of the Guardians present, our objection must prevail.

The judgment of the Court on these points was withheld until the conclusion of the argument upon the whole case.

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To the four last counts we object; firstly, because they do not set out the title of the plaintiffs to sue; secondly, nor specify with sufficient certainty the rateable hereditaments,\* which we say should, as in the first count, have been identified by number, or in some other effectual manner. In suing for tithe, the lands out of which

In an action against an immediate lessor, for poor's rate, the plaintiffs were stated to be "the Guardians of the Poor of Bal-

linrobe Union." In a similar action the plaintiffs were stated to be "the Guardians of the Poor of Castlebar Union." *Semble* in the former case, and *Held* in the latter, that the description of the plaintiffs' title to sue was sufficient.

In an action against an immediate lessor, for poor's rate, it is not necessary to state the respective numbers (as appearing in the rate-book) of the several rateable hereditaments in describing them; generality of statement in this respect being admissible, as the defendant may obtain all necessary information on the subject from the rate-book; *Semble*, in this case; *Held* so, in *Castlebar Union v. Browne* (*infra*, in notes).

A count in an action against an immediate lessor, for poor's rate stated that the defendant became liable to pay the amount of the said rate so remaining due and unpaid as aforesaid by the defendant in respect of the said hereditaments situate, &c., for which respectively he as such immediate lessor was by virtue of a certain Act of Parliament, "in due form of law rated as aforesaid." Whether this referential averment, in the absence of any other allegation that the defendant was rated, is sufficient, *Quære*? A special demurrer to this count, assigning as cause of demurrer that the count did not state "how, or in what manner the rate was imposed, or how the defendant is liable to the said rate," was held not to point out with requisite precision the inaccuracy of the above referential averment.

\* In the case of *The Guardians of the Poor of Castlebar Union v. Browne*, argued upon the 19th of January in this Term by the same Counsel, to counts similar to the four referred to in the text, objections the same as those firstly and secondly above named were taken upon special demurrer, but were disallowed—DONNERTY, C. J., saying, "these objections were made in the case of *The Ballinrobe Union v. Browne* yesterday before us, but the demurrer there being informal it was unnecessary to make any positive decision upon them. Now, however it is requisite that we should do so. We do not attach any weight to them. There are no precedents for such declarations; being therefore unfettered in that way, we should be reluctant to encourage, without any satisfactory reason, prolixity in the pleadings in such actions. For all purposes of justice and utility we think that the title of the plaintiffs is sufficiently set forth; and should the defendant require any greater particularity of information as to the rateable hereditaments, he can have no difficulty in obtaining it from the rate-book, which contains all the information possessed by the plaintiffs themselves upon the subject. We overrule the demurrer."

H. T. 1849. tithe comes must be fully and accurately stated; the same rule  
*Common Pleas.* should apply to an action for rates.—[JACKSON, J. Would not a  
 THE GUAR- bill of particulars supply the necessary information?]  
 DIANS OF Thirdly,  
 THE POOR those counts do not contain any express averment that the defend-  
 OF BALLIN- ant was rated in respect of those rateable hereditaments.  
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It is sufficient to say, as title, that the plaintiffs are the Guardians of the Ballinrobe Union. The rate-book will supply any specific information as to the rateable hereditaments which the defendant may desire. That book, the Court judicially knows, is kept for public inspection in an office open during certain hours for the purpose, according to the direction of the statute. Where a gross sum is claimed by a declaration, it is sufficient that facilities should be given *aliunde*, whence the minor sums of which it is made up may be ascertained. In the concluding part of the second count, in stating the non-payment by the defendant of the rate, it is expressly styled the rate "in respect of the said hereditaments situate in the "said Mayo Electoral Division, for which respectively the said defendant, as such immediate lessor, was, in virtue of the provisions "of the said Act so made and passed in the seventh year of, &c., in "due form of law rated as aforesaid." There is a similar averment in the third, fourth and fifth counts. If our objection to the two points of demurrer, last argued, to the first count—namely, that the demurrer is too large—be good, it applies to these counts also.

*Longfield*, in reply.

The granting of bills of particulars is limited to *indebitatus assumpsit*: 2 *Reg. Gen. Hil.* 1832.—[JACKSON, J. The practice of granting particulars of demand has been extended far beyond that.\*]—A bill of particulars would not cure the defect in pleading. As to the rate-book: suppose that the defendant is there rated for one hundred hereditaments, how is he upon reference to it to know for which fifty hereditaments the plaintiffs seek to recover rate?

\* Vide *Wildridge v. Clarke*, *infra*, p. 589.

The concluding averment read from the second and following counts, as to the non-payment of the rate in respect of which the defendant was "rated as aforesaid," is merely referential, being only an allegation that each count contained a previous averment that the defendant was rated, which it does not, the commencement of the counts being incomplete in that respect. The Act 1 & 2 Vic. c. 56, charges the rate upon the occupier; the Act 6 & 7 Vic. c. 92, in certain cases transfers it from him to the immediate lessor (whose name I admit need not be stated in the rate-book); thus in both cases the rate is charged upon the person, not the thing, hence arises the necessity of stating expressly in this action against the immediate lessor that he was rated.—[JACKSON, J. Where you are taking so very special an objection, I think that it may fairly be replied that your demurrer is not in this respect sufficiently pointed.]

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We agree with my Brother JACKSON as to the necessity of holding a party taking such a subtle objection to at least equally critical precision in pointing his demurrer to it. Here he has not done so with sufficient particularity.

After a short interval the judgment of the Court upon the points awaiting decision was delivered by—

DOHERTY, C. J.

This is the first occasion upon which a declaration for poor's rate has been brought before this Court. We do not complain of the length of time occupied by the able arguments in the case, the novelty of which entitled it to be thoroughly canvassed upon special demurrer. The pleader had considerable difficulties in his way in framing a declaration upon a new enactment without any precedent to guide him. The points raised by demurrer were numerous and special; of some we have already disposed, and of the others I shall now concisely state our opinion. One of these was an objection to the first count of the declaration, namely, that it proceeded not only for

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rate, but also for arrears of rate, and did not fix upon the defendant any liability in respect of arrears of rate. It was argued for the plaintiffs that "rate" and "arrears of rate" were synonymous in their meaning, and consequently that if the defendant's liability to rate was established, it was equally so with respect to arrears of rate; and that in fact arrears of rate meant nothing more than such sums as remained uncollected of the last rate imposed. But we think that the count itself clearly marks the distinction between those phrases and never once confounds them; it speaks of sums remaining due in respect of former rates, and then states that those sums were charged as arrears to the proper parties, and concludes by demanding "the said rates and arrears of rate." Never having named any other arrears than those sums due in respect of former rates, the pleader has precluded us from affixing to the term "arrears of rate" any other interpretation than that of unpaid bygone rates. If the case were sent down to trial before a Judge who had not the advantage of hearing the matter discussed so fully as we have had, as the first count now stands, great injustice might have been done in allowing the plaintiffs to recover bygone rates by an action in a Superior Court which the law never gave in respect to such rates. Certainly *primâ facie* it would be the impression of any person looking at this count, that upon a trial the plaintiffs might recover under it sums charged in the rate-book in respect of any former rates. Upon critical examination, on special demurrer, feeling that we cannot restrain "arrears of rate" in its signification to the rate last imposed, and inasmuch as no right to sue for bygone rates has been shown, we must upon this count give judgment for the defendant. If the plaintiffs think it necessary to apply for it, the Court will not feel any difficulty in giving them leave to amend generally; in which event it probably will not be necessary for us to say any thing upon the other counts.

*O'Donel* however asked for the judgment of the Court upon the four remaining counts.

DOHERTY, C. J.

We think the case cited by Mr. *Napier*, from 6 *Mees. & Wels.* p. 564 (*The Parrett Navigation Company v. Stower*), disposes of

the demurrer to those four counts, on the ground that it is too large. We have already decided against one of the objections to the first count (namely, the absence of an averment of publication of the rate in two of the Electoral Divisions), because it was applied to the first count generally, whereas that count being divisible the objection should have been confined to the bad part only. So here we hold that the demurrer is too large, being aimed at the whole declaration, and then assigning special causes of demurrer to the separate counts; there should have been distinct demurrers to each count. I may add, that we did not feel at all pressed by any of the objections to the first count, which we have left undecided, or by any of the objections\* which were urged in argument to the last four counts. The result of this case is, that there must be judgment for the defendant on the first count, and for the plaintiffs upon the other counts.

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*Longfield* applied for leave to plead to the four latter counts, the foregoing decision of the Court having been founded on the informality of the demurrer, and not on the validity of those counts.

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*Per Curiam.*

We refuse the application, there being no affidavit of merits on the part of the defendant.

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\* NOTE.—It will be observed that the Court did not expressly hold any of the counts to be good, although intimating a strong opinion that the objections to the four latter counts were not sustainable. It overruled the demurrer as being too large; however, in those cases in which a demurrer has been overruled as too large, it seems to have been regarded as necessary that some one count should be good. In the case of *The Guardians of the Poor of the Castlebar Union v. Browne*, already referred to (*supra* p. 567), four counts, similar to the four latter counts here, were held good.

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*Common Pleas.*

PILKINGTON v. WARNER.\*

Jan. 19, 20.

**A declaration DEBT.**—The declaration, filed as of Easter Term, 11 *Victoria*, and in debt commenced by A. D. 1848, commenced† by stating that the defendant “Gustavus stating that the defendant was attached by writ of privilege issuing out of this Court to answer the plaintiff, an attorney. Plea, that the plaintiff heretofore, “by an original writ,” impleaded the defendant in this Court in assumpsit, and that on his non-appearance he was put in exigent, and subsequently “outlawed in due form of law,” *prout patet*, &c., and afterwards that certain proceedings according to law and the statute were had, by virtue of which the outlawry was duly reversed according to law; and that “afterwards, to wit, on, &c., an appearance on behalf of the said defendant in said outlawry by E. C., one of the attorneys, &c., was then and there and in the said Court entered in due form of law on behalf of the said defendant in said outlawry, at the suit of the said plaintiff in said outlawry;” and that “afterwards and after such reversal as aforesaid, and after such appearance as aforesaid, to wit, on, &c., the said plaintiff in said outlawry impleaded the said defendant in said outlawry” in this Court, and afterwards filed a declaration in debt against him, “which said impleading and declaration are the impleading and declaration in the present action;” and that the present suit is for a different cause of action from the cause of action on which the outlawry was grounded; “as by the records and proceedings thereon in this Court more fully appear:” all which impleadings, declarations and proceedings are *contra formam statuti* (6 *Anne*, c. 15, s. 4).

*Held*, on special demurrer, that this plea was ill, forasmuch as it did not show any connection between the reversal of the outlawry and the entry of the appearance.

Whether the defendant should have cravedoyer of the original writ, upon which the outlawry was founded—*Quære?*

Whether the reversal of the outlawry should have been pleaded *prout patet*, &c.—*Quære?*

The demurrer complained that the reversal of the outlawry was not verified by the record. *Held*, that in consequence of the general reference to the record at the end of the plea, the demurrer was not sufficiently pointed, but should have assigned as special cause that there was not a separate and distinct reference to the record in verification of the reversal of outlawry.

Whether the statute 11 *Jac.* 1, c. 8, s. 2 (*Ir.*), which requires a defendant, who seeks to reverse his outlawry, to put in special bail to appear and answer in a new action at suit of the same plaintiff, and to satisfy the condemnation money; and the statute 6 *Anne*, c. 15, s. 4, which requires that the cause of action in the new suit should be identical with that in the outlawry, and allows the defendant to plead their difference in bar, are repealed, or whether either of them is repealed by the statute 3 & 4 *Vic.* c. 105, s. 9—*Quære?*

Whether the apparent contradiction in the plea in stating the outlawry to have been obtained according to law, and afterwards to have been reversed according to law, laid it open to a special demurrer—*Quære?*

An application (before argument of the demurrer) to set aside the above plea summarily, was refused.

\* TORRENS, J., absent in consequence of illness.

† This commencement seems to have been taken from *Tidd's Forms*, 119, ed. of 1826. The form given by *Ferguson* in his Collection, p. 550, varies slightly from that in the text. As to the nature of the writ of privilege: vide *Haward v. Denison* (Bar. 410); *Crewes v. Bayle* (Cro. Eliz. 215; S. C. 1 *Leo*. 329); *Finch v. Wilson* (1 *Wils.* 167).

“Warner was attached by her Majesty’s writ of privilege, issuing out of her Majesty’s Court of the Bench here, to answer George Pilkington, gentleman, one of the attorneys of the said Court of our said Lady the Queen of the Bench aforesaid, according to the liberties and privileges of the said Court for such attorneys and officers of the Court aforesaid, from time immemorial used and approved of in the same Court, of a plea that he render unto the said George Pilkington £991. 19s. 7d., which he owes to and unjustly detains from him; and thereupon the said George Pilkington, the plaintiff in person, complains.” Then followed in the ordinary form a count upon a bill of exchange for £141. 19s. 7d., drawn by the plaintiff, and accepted by the defendant, a count for interest, and the money counts, the sums sought amounting in the aggregate to £991. 19s. 7d. Damages were laid at £50, the declaration concluding in the usual manner, and containing no allusion to any outlawry of the defendant.

Plea (*actio non*), “because he says that the said plaintiff heretofore, to wit, in the tenth year of the reign of her present Majesty, by an original writ impleaded the said defendant in her present Majesty’s Court, before the Right Hon. JOHN DOHERTY and his Brethren, then her said Majesty’s Justices of the Bench at Dublin, in a plea of trespass on the case on promises, to the damage of the said plaintiff of £400 sterling. And the said defendant, because he did not appear in her said Majesty’s Court of the Bench or in the said Court of our Lady the Queen, to answer the said plaintiff in the plea aforesaid, according to the laws and custom of the realm, was put in exigent to be outlawed in Dublin in the county aforesaid. And the defendant further saith that afterwards, to wit, on the 1st day of May in the eleventh year of her present Majesty, in the said Court of our said Lady the now Queen of the Bench aforesaid, the said defendant was outlawed in due form of law at the suit of the said plaintiff in the aforesaid plea, to wit, a plea of trespass on the case on promises, to the damage of the said plaintiff of £400, to wit, at Dublin aforesaid; as by the records and proceedings thereof in her Majesty’s said Court of the Bench at Dublin aforesaid returned, and now there remaining, more fully appears.

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H. T. 1849. *Common Pleas.* “And the said defendant saith that afterwards, and after the pro-  
**PILKINGTON** nouncing of the said outlawry against the defendant in manner as  
*v.* “aforesaid, to wit, on the 8th day of May in the eleventh year of the  
**WARNER.** “reign of her said Majesty, at Dublin aforesaid, certain proceedings  
“in said outlawry at the suit of the said defendant in the said out-  
“lawry were thereupon had, and duly and in accordance with the  
“law shown to the said Court of the Bench here, and according to  
“the form of the statutes in that case made and provided, by virtue  
“of which the said outlawry against the said defendant was then and  
“there in accordance with the law and custom of the realm duly  
“reversed and set aside: and the defendant in fact saith, that after-  
“wards, to wit, on the day and year last aforesaid, at Dublin  
“aforesaid, an appearance on behalf of the said defendant in said  
“outlawry, by Edward Courtenay, one of the attorneys of her said  
“Majesty’s Court of the Bench, was then and there and in the said  
“Court entered in due form of law on behalf of the said defendant  
“in said outlawry, at the suit of the said plaintiff in the said out-  
“lawry. And the defendant saith, that afterwards and after such  
“reversal as aforesaid, and after such appearance as aforesaid, to wit,  
“on the said 8th day of May, at Dublin aforesaid, the said plain-  
“tiff in said outlawry impleaded the said defendant in the said  
“outlawry in the said Court of our Lady the Queen of the Bench  
“at Dublin aforesaid; and afterwards, in or as of Easter Term in the  
“said eleventh year of the reign of her said Majesty, the said  
“plaintiff in said outlawry in his own proper person filed a certain  
“declaration in the said Court against the said defendant in said  
“outlawry, to wit, a declaration in debt, that he the said defendant  
“in said outlawry should render unto the said plaintiff in the said  
“outlawry £99l. 19s. 7d.; to the damages of the said plaintiff in  
“said action and said outlawry of £50, to wit, at Dublin aforesaid;  
“which said impleading and declaration are the impleading and  
“declaration in the said present action now before the said Court  
“here. And the said defendant in fact saith, that the said impleading  
“and declaration in debt aforesaid, so filed as aforesaid on behalf of  
“the said plaintiff in said outlawry against the said defendant in this  
“action, and said outlawry, are not for the same cause of action as

“in the said writs of proclamation against the said defendant in  
 “said outlawry at the said suit of the said plaintiff in said outlawry  
 “hereinbefore averred and stated, but for another and different  
 “cause of action; and which said sums of money and said damages  
 “to the said plaintiff in said outlawry of £50, in said declaration  
 “mentioned, are not for the same sum as in the said writs of pro-  
 “clamation at the suit of the said plaintiff in said outlawry, against  
 “the said defendant in said outlawry mentioned, but for another and  
 “different sum, to wit, at Dublin aforesaid; as by the records and  
 “proceedings thereon in her Majesty’s said Court of the Bench at  
 “Dublin aforesaid remaining more fully appears: all which implead-  
 “ings, declarations and proceedings are contrary to the form of the  
 “statute in such case made and provided; which said last mentioned  
 “statute the said defendant craves leave to plead in bar to the said  
 “damages, sums of money and causes of action in said declaration  
 “in this cause mentioned.”—Verification and prayer of judgment.

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To this plea the plaintiff demurred. The points of demurrer were nine in number, and may be shortly stated thus, viz.—first, that the plea referred to and relied on the contents of a certain original writ, without having obtained or cravedoyer of it or set it forth; secondly, that the reversal of the outlawry relied upon by the plea was not properly pleaded, nor was it shown to the Court that such outlawry ever had been reversed, and that such reversal should have been pleaded as matter of record and verified by the record; thirdly, that it did not appear by the plea that the appearance which it alleged to have been entered on behalf of the defendant was connected with or entered in consequence of the outlawry or the reversal thereof; fourthly, nor did it appear in the plea that the impleading in this suit was not grounded on the usual writ of privilege, which was referred to in the declaration, or that an appearance for the defendant was not entered in the usual course to such writ of privilege; fifthly, nor did it appear by the plea that Edward Courtenay the attorney for the defendant in this suit is the same Edward Courtenay by whom the appearance mentioned in the plea was entered; nor that the impleading in this suit or the appearance of the defendant in the same is in any manner connected with

H. T. 1849. the supposed proceedings in outlawry; sixthly, ambiguity and uncertainty in the plea, in not showing whether the pleading in this suit is grounded on the appearance alleged to have been entered after the outlawry or on an appearance entered to the writ of privilege; seventhly, immateriality of the issue tendered, and no apt traverse or sufficient confession and avoidance of the cause of action mentioned in the declaration; eighthly, that it did not sufficiently appear by the plea but that the declaration in debt to which it referred is for the same cause of action as the cause of action in the writs of proclamation referred to in the plea; nor did it appear that the causes of action in the action of debt and in the action of assumpsit respectively referred to in the plea are not the same; ninthly, that the statute referred to and relied on in the plea is not now in force, but is in substance repealed by the statute 3 & 4 *Vic.* c. 105.

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The questions in this case arose upon the following statutes:—The statute 11 *Jac.* 1, c. 8, s. 2 (*Ir.*) enacts, “That before the allowance of any writ of error or reversing of any outlawry be had by plea or otherwise, through or for want of any proclamation to be had or made according to the form of this statute after the end of this present Session of Parliament, the defendant and defendants in the original actions shall put in good and sufficient bail not only to appear and answer to the plaintiffs in the former suits in a new action to be commenced by the said plaintiff in the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit within two Terms next after the allowing of the writ of error, or otherwise avoiding of the said outlawries.”

This Act is referred to and partly recited in the statute 6 *Anne*, c. 16 (*Ir.*), of which the 4th section enacts:—“That every declaration or declarations to be filed from and after the 28th day of November 1707, by any plaintiff in such outlawry against the defendant or defendants therein, after reversal thereof and entering bail, as by the said recited Act is prescribed, shall be for the same cause or sum contained in such writ or writs of proclamation to be directed and delivered as aforesaid, and for no other cause or sum; any law, custom or usage to the contrary in any wise not-

"withstanding. And if any plaintiff or plaintiffs in such personal action, his or their attorney or attorneys, shall from and after such reversal as aforesaid file a declaration or declarations against such defendant or defendants as aforesaid, for any cause or sum other than what is contained in such writ of proclamation as aforesaid, then every such defendant or defendants shall and may plead this law in bar to every such other cause or sum contained in such declaration contrary to this law."

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In Trinity Term 1848, *J. H. Orpen* and *Napier* moved that the plea should be taken off the file, and stated that, in truth the outlawry never had been reversed, as might be manifestly inferred from the plea itself, which did not venture to verify the reversal with a *prout patet*, &c., had it done so the plaintiff might have replied *nul tiel record*. They argued the case at considerable length, but all the arguments then used were repeated on the argument of the demurrer, which is given hereafter.

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*Lewis Morgan* and *Ross Moore*, for the defendant, said that some very important questions were raised by the plea; that the motion was, therefore, quite untenable, and that the defendant ought to get the costs of it as he had not pleaded the general issue, but had offered handsome terms of compromise.

DOHERTY, C. J.

The length at which Counsel for the plaintiff thought it necessary to go into this case, and, amongst other matters, to discuss a question as to whether the statutes of *Jac.* and *Anne* were repealed by the recent statute 3 & 4 *Vic.* c. 105, s. 9, convinces the Court that this is not a proper occasion for the exercise of summary interference. We refuse the motion, and direct that the costs of it be costs in the cause.

*J. H. Orpen*, for the demurrer.

Firstly—We object that the defendant has referred to an original

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writ without having craved oyer of it, as he should have done. We admit that the Court would not have granted it. Formerly the defendant was allowed oyer of the original writ in order to demur or plead in abatement for any apparent insufficiency or variance; but this indulgence having been abused, a rule was made that a defendant be not allowed oyer of an original writ, and that if he demand it, the plaintiff may proceed as if no demand had been made: 1 *Tidd Prac.* p. 588; 2 *Ferg. Prac.* p. 867. But nevertheless the defendant should have craved it: 17 *Vin. Ab. Oyer D*, 7; *Brag v. Digby (a)*. Where by a declaration it appears that the defendant was summoned instead of attached, or *vice versâ*, he cannot demur without craving oyer of the original in order to show that it does not warrant the declaration: 1 *Tidd Prac.* p. 433. A plea of the Statute of Additions is bad without oyer of the original writ, which by the practice of the Courts not being grantable, it seems that such a plea cannot now be pleaded, and accordingly the Courts have frequently set such pleas aside: *Tidd Prac.* p. 636; *Deshons v. Head (b)*. The defendant has not, therefore, materials to support this plea.

The second objection is, that the reversal of the outlawry should have been pleaded as a matter of record, and verified by the record. The Court will not reverse an outlawry, though both parties consent to it, except there be error assigned in the outlawry; for matters of record are not to be destroyed without sufficient cause, and the outlawry concerneth the King as well as the parties: 23 *Vin. Ab.* p. 379, tit. *Utlawry*, B, b 2. Judgment of outlawry must be pleaded as a matter of record: *Hage v. Skinner (c)*: the precedents all show this: *Dawson v. Lee (d)*; *Gawen v. Surby (e)*: therefore the reversal of it must be so. We have not any precedent exactly in accordance with this latter position; but in *Corbet v. Cook (f)*, which was debt upon an obligation conditioned that if the party appeared at Westminster such a day to answer, &c., that then, &c.

(a) 12 Mod. R. 189; S. C. 2 Salk. 658.

(c) 3 Lev. 29.

(e) 1 Lut. 5.

(b) 7 East, 382.

(d) Cro. Car. 566.

(f) Cro. Eliz. 466.

(this was a Sheriff's bond), the defendant pleaded that before the day of the return of the writ the Term was adjourned to Hertford, and that there he appeared. Upon demurrer the plea was held bad, because it did not conclude with *prout patet*, &c.; for although the defendant appears, yet if his appearance be not entered upon record, he forfeits his obligation, and he ought to conclude so; otherwise the plaintiff cannot have an answer thereto to say *nul tiel record*.

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The third, fourth, fifth and sixth objections may be taken collectively to amount to this, that there is nothing in the plea which connects the appearance with the outlawry, or shows that it was entered in reference to the outlawry. The words "defendant in said outlawry" are merely descriptive of the person against whom the appearance was entered; but those words do not imply that the appearance was entered in respect to or in consequence of the outlawry or its reversal; unless the word "afterwards," which prefaces the statement as to the entry of the appearance, be interpreted "in consequence of and upon the reversal of the outlawry;" a forced construction which the Court will not make in favour of such a plea. Even the identity of the attorney does not appear. It must be taken on demurrer that our declaration was grounded on a writ of privilege, as we have stated, which writ has not been averred to be for the same cause of action as that of the original writ upon which the outlawry is supposed to have been founded, even admitting that original writ to be existing, and unaffected by the reversal of the outlawry: *Bac. Ab. Outlawry*, H. 1; *March. Rep.* 9, pl. 21.

The seventh and eighth objections were pressed in the terms of the demurrer. *Serecold v. Hampson* (a) and *Havelock v. Geddes* (b) were mentioned.

Lastly—The statute 6 *Anne*, c. 15, s. 4, is by implication repealed by the statute 3 & 4 *Vic.* c. 105, s. 9.\* The sole object of

(a) 11 East, 624, *in nota*; S. C. 2 Stra. 1178; S. C. 1 Wils. 3.

(b) 11 East, 622.

\* Enacts "That in all cases in which a plaintiff intends to proceed to outlaw or waive a defendant by writs of *exigi* and proclamations, in order to compel the

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the 4th section of the 6 *Anne*, c. 15, was to protect the bail; but the latter Act abolishes the holding of the defendant to bail, and thus *cessante causâ, cessat et ipsa lex*.

*Ross Moore.\**

As to the first point; in none of the precedents of pleas of outlawry was oyer of the original writ craved: *Clift's Entries*, p. 14; *Morgan's Precedents*, p. 171, Ir. ed.; 2 *Shower*, pp. 443, 444; nor in *Richardson's C. P. Prac.* p. 23, where as here the original writ is *eo nomine* referred to; nor in 1 *Lutwyche*, p. 6, 1 *Mallory Ent.* pp. 16, 23.—[BALL, J. Those are old precedents, most probably of a date anterior to that at which the Courts determined upon refusing oyer of the original writ.]—For that reason the precedents tell *a fortiori* in our favour. It is not the duty of a party pleading a matter to crave oyer, but only to make *profert*, the *non profert* is not the objection of the plaintiff. Secondly, it is denied that the reversal of the outlawry has been properly pleaded, because not verified by the record; however this objection cannot be sustained. In the concluding portion of the plea we use the words "as by the records and proceedings thereon in her Majesty's said Court, &c., remaining, more fully appears;" which being a general reference to "records and proceedings," *reddendo singula singulis*, is equivalent to a reference to each.—[DOHERTY, C. J. Their demurrer would appear to deny any reference to the record, but you say that there is a general reference to all, *prout patet*, &c., although not a distinct and separate reference to each. If this be so their demurrer is not sufficiently pointed in saying or implying that there is no reference.]

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appearance of such defendant in any civil action, it shall and may be lawful for such plaintiff to take such proceedings, and to sue out such writ and writs of *capias* for that purpose, in such manner as may now be lawfully done; but no defendant shall be arrested, detained in custody or held to special bail, under or by virtue of such proceedings, writ or writs."

Section 35 of the same Act limits the time for bringing a new action, after reversal of outlawry, to one year.

\* He argued the case for *L. Morgan*, who was ill.

*Orpen.*

“Records and proceedings” refer merely to the last antecedent.—[BALL, J. Impossible, the words are in the plural number.—JACKSON, J. The plaintiff’s objection should have been that the reference to the record of the reversal is not sufficiently certain, and not that there is not any, as the demurrer virtually alleges. The reference may be irregular; I do not say that it is so; but surely the plaintiff cannot say that there is none.]

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*Ross Moore.*

The reversal, being mere matter of inducement, need not to be so certainly stated as the substance of the plea itself: *Co. Lit.* 303, *a*; *Com. Dig. Pleader*, C. 31, 77; *Ibid*, E. 10, 18; especially if it be a plea in bar in excuse: *Co. Lit.* 303, *a*.

Next, as to the third, fourth, fifth and sixth points; the word “postea” is a conjunctive expression, and connects the appearance with the reversal of the outlawry which immediately precedes it. The word must receive a reasonable intendment: *Com. Dig. Pleader*, C. 25. In considering the plea the Court will incorporate with it the statute 11 *Jac.* 1, c. 8, s. 2 (1 *Chitty*, p. 246, 5th ed.), which statute renders the putting in of bail to appear and answer the plaintiff in a new action, and to satisfy the condemnation, a condition precedent to the reversal of any outlawry. In this point of view the dependence of the appearance upon the reversal becomes manifest; for even supposing that it be no longer necessary to give bail, still the appearance must be entered before any reversal takes place.—[BALL, J. Has not the plaintiff the option of proceeding either upon the former writ or upon a new writ? Is it not an open question upon this plea as to whether the appearance was to the former writ or to a perfectly new and distinct writ?—We ask for a reasonable intendment of the words, which are to be construed favourably, being mere inducement.—[JACKSON, J. But this defect is pointed out specially by the demurrer.]—Yes; but it is a violent construction of the plea to apply the appearance to any thing but the outlawry and its reversal.—[BALL, J. But the plea must be read with the declaration which

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recites the issuing of a writ of privilege.]—*Quæcunque viâ* the plea is good; because whether the plaintiff issue a new writ or proceed upon the old writ, the cause of action is required by the statute of *Anne* to be the same.—[BALL, J. There may have been twenty other causes of action after the plaintiff had outlawed the defendant in one, so that there may have been twenty other appearances than that in the outlawry; one of those twenty appearances may be that upon which the declaration has been filed: it was an important part of your defence to show clearly and beyond cavil or dispute that the appearance declared upon was that entered in the outlawry.]—A statutable plea is not open to the same strictness of construction as a dilatory plea. There is but one appearance mentioned in the plea, and but one declaration stated to have been filed; and as already said, the word “afterwards” connects them with the reversal of the outlawry. All these facts being consecutively stated in their proper chronological order, it is difficult to perceive how an intendment can be made that the appearance and declaration had any other foundation than the outlawry, more especially where we have alleged that the appearance was entered for “the defendant in the said outlawry.” It is hypercritical to say that it may have been entered for the same individual in another action; admitting the identity of person, yet in reference to a distinct action he would have been described as the defendant in that action and would have been improperly described as the defendant in the outlawry; and the Court is not to intend that our description is wrong where there is nothing to show or even render it probable that it is so.

With respect to the original writ continuing in force notwithstanding the outlawry, *Lusher v. Marshall* (a) and *Hesse v. Wood* (b) were cited.

The seventh and eighth points depend altogether upon the validity of the other objections.

The ninth and last point is, that the statute of *Anne* is repealed by 3 & 4 *Vic. c. 105, s. 9*. This clause does not occur in the analogous Act in England; and some doubt has there arisen as to

(a) Sir W. Jones, 442; S. P. 1 Wilson, 3.

(b) 4 Taunt. 691.

the effect of that Act in cases of outlawry : *Harvey v. O'Meara* (a). There is nothing inconsistent with the statute of 6 *Anne*, c. 15, s. 2, in the 3 & 4 *Vic.* c. 105. An Act has never been construed to repeal a prior Act, unless there be a contrariety or repugnancy in them, or at least some notice taken of the former Act so as to indicate an intention to repeal it : *Dwarris on Statutes*, p. 533. The law does not favour a repeal by implication ; if it be possible to reconcile two Acts, though seemingly repugnant to each other, the Court will struggle to do so, even though there be negative words : *Dwarris on Statutes*, p. 533 ; 15 *East*, p. 377 ; *Forster's case* (b). And such is the law where there is a complete difference in the purview of two Acts, apparently relating to the same subject : *Rex v. Downes* (c). The object of the statutes of *James* and *Anne* was to protect persons from improper outlawries, and to regulate the proceedings in and for the reversal of outlawries. Nothing can be more different than the policy of the 3 & 4 *Vic.* c. 105, which is the abolition of arrest on *mesne process*.

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*Joy*, on the same side and same point.

The 3 & 4 *Vic.* c. 105, s. 2, does not repeal the 11 *Jac.* 1, c. 11, s. 2, which requires a defendant seeking to reverse an outlawry to give bail to appear and answer, &c. The 3 & 4 *Vic.* relates only to proceedings by the plaintiff by writs of *exigi* and proclamations in order to compel the appearance.—[JACKSON, J. You contend that, in the latter part of the section, viz., “No defendant shall be arrested, detained in custody or held to special bail under “or by virtue of such proceeding, writ or writs,” that the words “such proceeding,” &c., relate only to preliminary proceedings by the plaintiff in the outlawry, and not to steps taken by the defendant to have it reversed.]—Exactly so, and that the statutes of *James* and *Anne* ought to be construed together. But even supposing that the 2nd section of the statute of *James* as to the giving bail be repealed, and that we strike out of the 4th section of the statute of *Anne* the

(a) 7 Dowl. Pr. Ca. 725.

(b) 11 Rep. 63.

(c) 3 T. R. 569.

H. T 1849. words "and entering bail," which are the only words there relating  
*Common Pleas.* to bail, and which are but incidentally introduced, we still have that  
 PILKINGTON section requiring the identity of the causes of action.

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Both the Acts of *James* and *Anne* were enacted solely with a view to the protection of defendants, and never affect to extend any benefit to the bail. By insisting upon the repeal of any portion of those enactments beyond that which expressly enjoins the putting in of bail, an argument is used, of which, when carried out, the inevitable tendency is to show the total repeal of those Acts, and the destruction of the bulwarks wisely erected by our early legislators against unfairly and oppressively obtained outlawries—a consequence which it will scarcely be contended was ever contemplated by Parliament in passing the 3 & 4 Vic. c. 105.—[JACKSON, J. It appears to me that we should feel some difficulty in holding that the 9th section of the 3 & 4 Vic. c. 105 repealed any part of the statute of *Anne* farther than to render bail unnecessary.]—The English statute (12 G. 1, c. 29), which, like Pigot's Act, relaxed the law with regard to mesne process, might as well have been held to repeal the prior statutes in that country upon outlawries; but we find that no such consequence followed its enactment: *Cracraft v. Gledowe* (a); *Rayer v. Cooke* (b); *Serecold v. Hampson* (c), in which Dennison, J., says:—"As to the statute 12 G. 1, this case is not within "that statute, for there is a difference between proceeding to an "arrest and an outlawry; for where it is to an outlawry, it is not "by way of arrest. That statute says you shall not proceed to "arrest but where there is an affidavit that the debt is £10 or "upwards; but this being an outlawry by special original, it is "not an arrest; and so it was not the intention of the Act that in "this case the affidavit of the debt should be in the first instance, "and before any process issues." This strongly supports the first part of my argument; the distinction is taken by the learned Judge between a proceeding to arrest and an actual outlawry. The 3 & 4 Vic. c. 105, s. 9, does not touch the case of proceedings upon

(a) 3 Barr. 1482.

(b) 3 B. & C. 529.

(c) 12 East, 624, *in noll*; S. C. 1 Wils. 3; 2 Stra. 1178; 1 Salk. 496.

a judgment of outlawry. The defendant is not detained by virtue of "the plaintiff's proceeding by writ," &c., to compel an appearance; but by his own proceedings, to reverse the outlawry; he in fact voluntarily coming in for that purpose. The statute of *Victoria* is confined to proceedings by writs.—[BALL, J. At present that does strike me as an answer to the objection.]—That the system as to the reversal of outlawry stands unaffected by 1 & 2 *Vic. c. 110*, may be inferred from *Harvey v. O'Meara (a)* and *Stultz v. Wyatt (b)*.

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With respect to the third, fourth, fifth and sixth objections, it seems to me that the averment of the entry of an appearance may be treated as surplusage; striking it out, we still have that a judgment of outlawry was reversed according to the statute, and that "afterwards" the plaintiff impleaded the defendant for a different cause of action; and thus the plea is complete, for the statute has been stated to have been complied with, and no averment as to appearance is necessary.—[JACKSON, J. Such a reading of the plea might produce gross injustice. It would seem to preclude a plaintiff under similar circumstances from being able to enforce rights arising out of matter wholly unconnected with the outlawry; because the defendant has not identified the proceedings in the present action with the reversal of the outlawry, unless indeed we interpret *post hoc* to mean *propter hoc*; why we should so pervert language in favour of such a plea is not very easy to comprehend.]—We have followed the words of the statute closely.—[JACKSON, J. But you must bring your case within the spirit of the Act also.—BALL, J. What shall be the benefit of the statute in pleading depends upon the rules of pleading.]—By reading the words "on behalf of the said defendant" in a parenthesis, we have that "afterwards to wit, on &c., at &c., an appearance (on behalf of the said defendant) in said outlawry by, &c., was then and there and in the said Court entered in due form of law:" this is the natural reading of the passage, and affords a full averment that the appearance was in the outlawry. We have averred the impleading of the defendant

(a) 7 Dowl. Pr. Ca. 725.

(b) 9 Jur. 131.

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by the plaintiff to have been after the appearance, and thus excluded the possibility of the appearance having been to the writ of privilege.—[JACKSON, J. But there may have been another appearance in this action. BALL, J. And in pleading a bar you must exclude all intendment.]—Our plea substantially says that the plaintiff has availed himself of an appearance previous to the writ of privilege to declare against us.

*Napier*, in reply.

The defendant has stated that the outlawry was obtained in due form of law, and then contradicts himself by alleging that it was reversed, which it could have been for error only. Counsel, after alluding to *The Attorney-General v. Richards (a)*, was stopped by the Court.

DOHERTY, C. J.

We do not find it necessary to call on Mr. *Napier* to reply, as we are unanimous in considering that the plea is bad upon the latter ground, upon which Mr. *Joy* very ably endeavoured to defend it. We feel that there is nothing on its face which directly connects the appearance with the outlawry. Howsoever closely the defendant may have echoed the words of the statute of *Anne* in his plea, he has failed to bring himself within its spirit. It is part of the very gist of a valid defence under that statute to make it apparent to the Court that the plaintiff is seeking to avail himself of the proceedings incidental to the reversal of the outlawry for the recovery of a demand wholly foreign to that for which the outlawry was obtained. But the defendant has not shown that the proceedings now before us arise out of those in the outlawry; upon this point, his plea is ambiguous and uncertain. Under those circumstances, were we to allow this defendant to succeed, it would be equivalent to saying that a person who had once outlawed another could not after reversal of the outlawry recover from him in respect of claims unconnected with those upon which the outlawry rested.

(a) 8 Beav. 380.

The observations which have been made by the different Members of the Court during the argument render it needless for me to go further into the subject.

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BALL, J.

We are not giving any opinion as to whether the statutes of *James* and *Anne*, or either of them, be repealed by the 3 & 4 Vic. c. 105.

*Ross Moore* applied for leave to amend the plea in the formal point decided against him, in order to raise the question as to the repeal of the statutes of *James* and *Anne*.

DOHERTY, C. J.

At present we allow the demurrer; you must make a special motion for leave to amend, and that too upon a very clear affidavit of merits.

Demurrer allowed.

EVANS v. FIGGIS.

Jan. 18.

**ASSUMPSIT** upon a bill of exchange, and the money counts.—To the count on the bill the defendant specially demurred, and to the others pleaded *non-assumpsit*.

A special demurrer having been filed to a count on a bill of exchange, the plaintiff applied for leave to amend generally on payment of costs; and to change the venue, without assigning any grounds for the latter part of

*Johns*, upon the part of the plaintiff, moved for leave to change the venue and to amend the first count.—[DOHERTY, C. J. It is rather suspicious that a plaintiff should capriciously seek to remove the venue without assigning any ground.]—In an *Anonymous*

the application. *Held*, that the first part of his motion should be granted, and the latter part refused, and that he should pay the costs of the motion.

H. T. 1849. *case (a)*, before Burton, J., it was held that the amendment might be general.—[DOHERTY, C. J. Can change of venue be called an amendment?]  
 Common Pleas. EVANS v. RIGGIS. We have, by our notice, asked for leave to change the venue, and it is not necessary to assign special grounds: *Browne v. Lambert (b)*; *Nesbitt v. Barrett (c)*.

*Mockler*, for the defendant, resisted the motion, and said that *Aungier v. English (d)*, and the case of *The Administrators of King v. Sharry*, reported in the note to that case, showed that the practice in the Queen's Bench and Common Pleas now was, to require the assignment of special grounds for changing the venue.

DOHERTY, C. J.

The plaintiff is entitled to amend generally on payment of costs; but he goes further and asks to change the venue. We do not think that a matter of course, or according to the practice of this Court. He lays no ground whatever for changing the venue. We wish to adhere to the ruling of this Court in *Aungier v. English*, and that of the Court of Queen's Bench, as reported in the note to that case. The plaintiff having sought by his notice two things, one of which he has obtained, but not the other, the defendant was justified in coming here to resist this motion; and accordingly the plaintiff must pay the costs.

(a) 3 Ir. Law Rep. 216.

(c) Batty, 493.

(b) 4 Law Rec. O. S. 266.

(d) 7 Ir. Law Rep. 226.

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WILDRIDGE v. CLARKE.

Jan. 30.

**COVENANT.**—The breaches complained of were frequent obstructions, during a long period of years, of the ingress, regress and egress of the tenants of the plaintiff into, through and out of a lane or passage. The notice of motion demanded that proceedings should be stayed until plaintiff furnished a full bill of particulars, setting forth the several breaches and times (either in days or weeks) when committed, the names of the tenants obstructed, and the mode of obstruction adopted.

In an action for breach of covenant by obstructing the tenants of plaintiff in the enjoyment of an easement, the plaintiff was required to furnish a bill of particulars of the obstructions, the times of their occurrence, the names of the tenants obstructed, and the mode of obstruction.

*O'Leary*, for the defendant, now moved the above notice, and mentioned *Scarlett v. The Corporation of Dublin (a)*.

*Hobart*, for the plaintiff, said that the case cited was one of *indebitatus assumpsit*. In an action on the case for injuries to a water course, a bill of particulars has been refused, a special ground not having been laid for it: *Burke v. Gogarty (b)*.—[*DOHERTY*, C. J. That was in 1826; the case mentioned by Mr. *O'Leary* was in 1833.]—The practice has been changed since.—[*BALL*, J. Yes, the change has been, that the Courts are even far more liberal in granting bills of particulars.—*JACKSON*, J. With respect to *Burke v. Gogarty*, it should be recollected that in actions for obstructing a water course the counts themselves must be very special in stating the injury done, and are nearly tantamount to bills of particulars.]—In an action of covenant by the assignee of a lease for non-payment of rent and non-repair, the Court refused to compel the plaintiff to give particulars, *Coleridge*, J., observing, that the plaintiff did not seem to know more

(a) 1 Law Rec. N. S. 205.

(b) Batty, 218.

H. T. 1849. *Common Pleas.* than the defendant: *Sowler v. Hitchcock* (a).—[DOHERTY, C. J. Principle and reason are against you. I know no case sufficiently strong to prevent the Court from making a precedent in favour of granting particulars in such cases as this.]—In *Brooke v. Chitty* (b), also an action of covenant, particulars were refused. It will be impossible for us to give such particulars as have been demanded.

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DOHERTY, C. J.

I am a little surprised that you do not perceive that *Brooke v. Chitty* has not the slightest resemblance to the present case. If it be impossible for the plaintiff to give particulars such as required, the sooner he abandons his action the better. The modern and more wholesome practice has been, to require plaintiffs to specify their demands more fully and frequently than was usual some years ago. This seems to be a very proper case for a bill of particulars.

Motion granted.

(a) 5 Dowl. Prac. C. 724.

(b) 3 Chit. Gen. Prac. 614, n.

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## ABATEMENT.

See PLEA IN ABATEMENT.

## ACCOUNT STATED.

1. After the dissolution of a partnership, an account by a member of the partnership, authorised to wind up the affairs of the partnership, and signed by him in the name of the firm, furnished to a creditor of the partnership, and admitting their liability to an extent therein stated; *Held*, not sufficient evidence of a new contract, so as to remove the bar created by the Statute of Limitations (9 G. 4, c. 14), and make another member of the partnership liable on foot of it. Q.B. *Bristow v. Miller* 461
2. *Held also*, that this account was at most but an acknowledgment of a debt, and not being signed by the defendant, was not sufficient evidence of a new contract within the meaning of the statute. *Ibid*

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## ACTION.

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## AFFIDAVIT.

See SCIRE FACIAS, 3.

1. Where the only affidavit of the service of the writ was that of the process-server, which stated that he personally served the defendant with a writ of *capias ad respondendum* dated the 1st of February 1847, returnable the 17th of February 1847, with a notice at foot directing the defendant to appear at the return thereof, being the 17th day of April 1847; the Court set aside the parliamentary appearance and subsequent proceedings, upon an affidavit by the defendant "that he was not served with any process in this cause by J. M. the process-server, or by any other person, and never knew of the institution of this suit until the Sheriff of the Queen's County entered his house and seized his goods and chattels at the suit of the plaintiff." L.E. *Mooneys v. Purcell* 51
2. The affidavit to ground a criminal information for provoking a party to commit a breach of the peace by fighting a duel, should in all cases state that such was the intention of the party. Q.B. *Regina v. Kelly* 217

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FRAUDS, STATUTE OF.

## AMBIGUITY.

A conviction under the statute 10 G. 4, c. 34, and which was headed "county of Galway, to wit," recited that the  
1 L

## AMENDMENT.

plaintiff was convicted before four of her Majesty's Justices of the Peace "for the said county, for that he the said P. S. did assault the police, on Saturday evening, the 22nd day of July, at Ahascragh," without either naming the parties assaulted, or alleging that the place where the offence was committed was within the jurisdiction of the Justices. *Held*, that the conviction was ambiguous and bad. L. E. *Smith v. Mahon and another* 1

## AMENDMENT.

See SETTING ASIDE PROCEEDINGS, 5.

## CRIMINAL INFORMATION, 2.

1. Where there being no affidavit of service of process upon two of three defendants, who had been included in the same capias, and yet the plaintiff entered parliamentary appearances for them, and declared jointly against all three; the Court refused to set aside the proceedings, but ordered the declaration to be amended by striking out the names of the parties who had not been served. L. E. *Morris v. Scully and others* 47
2. Where pleas in *quare impedit* have upon demurrer been overruled, the defendant, if he seek to amend, must give notice of a motion for the purpose, and must supply the plaintiff with a list of the proposed amendments. C. P. *Regina v. The Bishop of Cork and another* 114
3. The rule that the Crown neither pays or receives costs, does not apply to cases in which, either on its part or on that of the opposite party, a favour is sought from the Court; *ex. gr.*, on a motion by the defendant, in a suit by the Crown, for leave to amend some of many pleas, to all of which a demurrer had been allowed, the Court permitted him to do so, only however on the terms of paying the costs attendant upon the demurrer to all, and the costs of the motion. *Ibid*

## APPRENTICE.

4. It is irregular to sue in the names of two public officers of a banking company; but the Court will, even after appearance, amend the writ by striking out the name of one of the public officers. Q. B. *Grimshaw and another v. Bowden* 399
5. Where a plaintiff unnecessarily makes proferet of an indenture, and the defendant craves oyer, the Court will not on motion set the rule for oyer aside, but will allow the declaration to be amended on payment of costs. Q. B. *Harvey v. Doherty* 460
6. Liberty given to amend the declaration by changing the form of action from debt to assumpsit—a plea of confession having been given in which the action was alleged to be in assumpsit instead of debt. Q. B. *Dickson v. Thomson* 502
7. A special demurrer having been filed to a count on a bill of exchange, the plaintiff applied for leave to amend generally on payment of costs, and to change the venue, without assigning any grounds for the latter part of the application. *Held*, that the first part of his motion should be granted, and the latter part refused, and that he should pay the costs of the motion. C. P. *Evans v. Figgis* 587

## APPEARANCE.

See AMENDMENT, 1, 4.

## APPOINTMENT.

See CORONER.

- A weighmaster appointed under the 3rd section of the statute 4 *Anne*, c. 14, holds his office for life. An appointment to hold it during pleasure is void. L. E. *Stephenson v. Stephens* 10

## APPRENTICE.

- J. B. S. was apprenticed to an attorney who was in partnership with the respondent, the covenants of the indentures being to serve the partnership, and the apprentice fee being paid by

## ARBITRATION.

a bill of exchange drawn in the name of the firm and accepted by the apprentice's father; his master having died, the surviving partner claimed the benefit of the apprentice's contract, and refused, though he had himself no vacancy for an apprentice, either to deliver up the indentures or consent to their being assigned except to a person named by himself, unless he was paid a certain sum. The Court, upon the petition of the apprentice's mother and guardian, ordered the respondent to deliver up the indentures in order to their being assigned, and it was referred to the officer to report how much of the apprentice fee should be refunded by the respondent, although it was stated upon affidavit that he had never received any portion of it. *L. E. Stewart, petitioner; Davis, respondent* 34

## ARBITRATION.

*See* COUNSEL, 2.

## ARREST OF JUDGMENT.

*See* INDICTMENT.

## ASSAULT.

*See* CONVICTION.

## ASSIGNEE.

*See* ASSIGNMENT.

## ASSIGNMENT.

*See* PLEADING, 36, 37.  
SCIRE FACIAS, 3.

## ASSUMPSIT.

*See* MONEY HAD AND RECEIVED.

## ATTACHMENT.

*See* BOROUGH COURT, 1.  
MANOR COURT.

## ATTORNEY.

*See* COSTS, SECURITY FOR.

1. J. B. S. was apprenticed to an attorney who was in partnership with the respondent, the covenants of the in-

## AVERMENT.

3

dentures being to serve the partnership, and the apprentice fee being paid by a bill of exchange drawn in the name of the firm and accepted by the apprentice's father; his master having died, the surviving partner claimed the benefit of the apprentice's contract, and refused, though he had himself no vacancy for an apprentice, either to deliver up the indentures or consent to their being assigned except to a person named by himself, unless he was paid a certain sum. The Court, upon the petition of the apprentice's mother and guardian, ordered the respondent to deliver up the indentures in order to their being assigned, and it was referred to the officer to report how much of the apprentice fee should be refunded by the respondent, although it was stated upon affidavit that he had never received any portion of it. *L. E. Stewart, petitioner; Davis, respondent* 34

2. A notice of motion signed by an attorney, the date of whose certificate is subsequent to the date of the notice, is irregular. *L. E. Anonymous* 57
3. Where an attorney entered into a special agreement with his client that he would not seek to make him responsible for costs, but would look to the opposite party for them; *Held*, in an action for work and labour by the attorney, such agreement being proved, the attorney could not recover. *Q. B. Kighron v. McCullagh* 456
4. Parties may, at any time before judgment, compromise an action without the intervention of their attorney. *Q. B. Harbison v. Wilcox* 500
5. This Court will not sanction a consent entered into at *Nisi Prius* between the attorneys of the parties to pay the jury a larger sum than they are entitled to. *Q. B. Molloy v. Browne* 503

## AVERMENT.

*See* PLEADING, 9, 12, 35.

## BAIL IN ERROR.

## BAIL IN ERROR.

See ERROR, 4.

Plaintiff below, becoming plaintiff above, is not required to give bail in error.

C. P. *Watters v. Lidwill* 322

## BANKING COMPANY.

See PUBLIC OFFICER.

## BILL OF EXCHANGE.

See PLEADING, 33, 34.

## VENUE.

To a declaration by the plaintiff, as indorsee of two bills of exchange, the defendant pleaded that he did lose a certain sum of money to A B, and the said A B did win of the defendant a certain sum of money, to wit, the sum of £500, by gaming and playing at a certain game called hazard, and that he accepted those two bills as security for the money so lost; and that the plaintiff when he became indorsee and holder and interested in those bills, knew that the same had been made on this illegal consideration. Replication protesting that the said bills were given for this illegal consideration, nevertheless that the bills before they became due were indorsed to the plaintiff for valuable consideration, and that when he first became and was the indorsee and interested in said bills, he did not know that same had been made for the illegal consideration alleged. *Held*, on special demurrer, that the replication was sufficient.—CRAMPTON, J., *dissentiente*. Q. B. *Batcock v. Cole* 306

## BILL OF PARTICULARS.

1. In an action by an engineer, against one of the promoters of a Railway Company for services in furtherance of the undertaking, after notice of trial had been served and withdrawn, and witnesses examined under a commission, upon its being shown by affidavit that the necessity for such withdrawal arose from the opinion of Counsel, to whom a case for the advice of proofs on behalf of the plaintiff

## BOROUGH COURT.

had been sent, and that the plaintiffs were in London at the time attending the examination of witnesses under the commission; the Court permitted the plaintiff to serve a further bill of particulars, upon terms of the defendant being at liberty to lodge such sum in discharge of the action as he may be advised, as of the date of his plea; with liberty to him to plead *de novo*, and to issue a new commission, and to examine the former witnesses, and such others as he might give the plaintiff due notice of. L. E. *Frazer v. Montgomery* 28

2. In an action for breach of covenant by obstructing the tenants of plaintiff in the enjoyment of an easement, the plaintiff was required to furnish a bill of particulars of the obstructions, the times of their occurrence, the names of the tenants obstructed, and the mode of obstruction. C. P. *Wildridge v. Clarke* 589

## BISHOP.

1. A lease made by a Bishop, Dean or other dignitary, under the enabling and disabling statutes, requires no confirmation. Q. B. *Lessee Collins v. Knox* 492
2. The statute 10 W. 3, c. 6, s. 7, disabling Rectors, Vicars, Curates, Incumbents or other Ecclesiastical Persons whatsoever from making alienations, leases, &c., of glebes for more than one year, does not apply to Bishops, Deans or other dignitaries. *Ibid*

## BOND.

See LIMITATIONS, STATUTE OF, 2, 3, 4, 5.

## BOROUGH COURT.

See PLEADING, 32.

1. On a writ of error from the Recorder's Court of the borough of Dublin, these several errors were assigned:—that no original writ was stated on the record as having been filed; that it did not appear that the plaint therein mentioned was returned *non est*

## BOROUGH COURT.

*inventus*, or that the plaint was ever returned or issued; that there was no averment that any summons had issued or been served previous to the attachment, and that there was no entry thereof, and that no process upon the plaint was stated to have been made or issued; that there was no sufficient affidavit of debt according to the statute, and that the attachment and bail-piece were not in accordance with the form given by the statute; that there was a variance between the plaint and the declaration; that no writ of distringas, or venire, or jury process was averred, and that there was no proper entry of continuances or of *similiter*. *Held*, that since the passing of 3 & 4 Vic. c. 108 (the Municipal Act), the non-averment on the record of a summons issuing before attachment granted is immaterial. *Q. B. Milner, in error, v. O'Brien* 250

2. *Held also*, that no objection for the want of a distringas, venire or jury process could be raised, when there was a statement that a jury had been sworn and given a verdict. *Ibid*
3. *Held also*, that the Statute of Jeofails and the appearance of the defendant below cured the other errors assigned. *Ibid*

## CAPIAS AD RESPONDENDUM.

*See* PROCESS.

SERVICE, SUBSTITUTION OF.  
SETTING ASIDE PROCEEDINGS,  
1, 2.

## CESS.

*See* GRAND JURY CESS.

## CHAMPERTY.

*See* ATTORNEY, 3.

## CLIENT.

*See* ATTORNEY, 3.

## COLLATERAL DESCENT.

*See* PLEADING, 23, 24.

## COMMITTAL.

5

## COLLUSION.

*See* COMPROMISE.

## COMMISSION TO EXAMINE.

In an action by an engineer against one of the promoters of a Railway Company for services in furtherance of the undertaking, after notice of trial had been served and withdrawn, and witnesses examined under a commission, upon its being shown by affidavit that the necessity for such withdrawal arose from the opinion of Counsel, to whom a case for the advice of proofs on behalf of the plaintiff had been sent, and that the plaintiffs were in London at the time attending the examination of witnesses under the commission; the Court permitted the plaintiff to serve a further bill of particulars, upon terms of the defendant being at liberty to lodge such sum in discharge of the action as he may be advised, as of the date of his plea; with liberty to him to plead *de novo*, and to issue a new commission, and to examine the former witnesses, and such others as he might give the plaintiff due notice of. *L. E. Frazer v. Montgomery* 28

## COMMISSIONERS, TOWN.

*See* PLEA IN ABATEMENT.

## COMMISSIONERS, POOR-LAW.

*See* POOR-LAW.

## COMMITTAL.

1. The 1 & 2 Vic. c. 56, s. 59 (Poor-law Act), provides, that if any person shall desert his wife or child, so that they become relievable in a work-house, every such offender shall, on conviction before a Justice of the Peace at Petty Sessions, in open Court, be committed to gaol, to be kept to hard labour for any term not exceeding three months; 10 & 11 Vic. c. 84, s. 1, repealed that clause, and provided that every person who should desert or wilfully neglect to

maintain his wife or child, so that they became relievable in or out of a workhouse, should be committed to gaol and kept to hard labour for a term not exceeding three months. A committal, bearing date in 1848, and stating that B., on the 8th of August 1845, at Henry-street, within said district, did desert his wife and children, and that they became destitute, and were on the 29th of December last past admitted into the workhouse in said district, and were still relieved there, *Held*, a bad committal, there being nothing in it to show that the destitution and the relief afforded were connected with the particular desertion in 1845; and the statute not having passed until 1847, the offence must have begun after the passing of that statute. Q. B. *In re Frederick Byrne* 538

2. *Held also*, Divisional Magistrates of the police district of Dublin have jurisdiction in every case of offences committed within their district that are punishable by a Justice. *Ibid*

#### COMPENSATION.

1. A writ of mandamus recited the B. and B. Railway Act, and its incorporation with the Lands Clauses Consolidation Act, and Railway Clauses Act, and after setting out the 68th section of the last Act, stated that the prosecutor was in the occupation of a piece or parcel of ground adjoining the said railway, &c.; and also in occupation of another piece or plot of ground, strand or slob, adjoining, &c., and running back to low-water mark in the Belfast Lough, &c.; and that he had erected a dwelling-house, &c., and that his principal inducement for so doing was the situation of said property contiguous to the sea, affording facilities for the enjoyment of sea bathing, fishing and shooting; that the Railway Company had raised an embankment upon and over a portion of the lands in his occupation, and by reason thereof he and his family were excluded access

#### COMPENSATION.

to the sea; that by notice he had called on the Company, specifying the accommodation works required to be made by them in consequence of the interruption to the use of his lands, &c.; and that they were not works with respect to which he had agreed to receive compensation instead of the making of said works; that the Company declined to execute the same: and concluded by commanding the Company to make such communication under the railway as should be necessary for the purpose of making good the interruption caused by the railway to the use of the lands in the prosecutor's occupation. The return set out several notices to treat, served by the Company on the prosecutor for the purchase of his lands, and then set out the 94th section of the Lands Clauses Consolidation Act, and averred that the land divided by the railway embankment was and is of much less value than the expense of making a communication between the intersected lands; that the Company called on him to sell the said piece of land, and that the prosecutor failed to treat, and that they then offered him compensation, and he declining, they summoned a jury to assess the compensation; that the prosecutor did not attend before the jury, and that the Company then required a surveyor to make the necessary valuation of the premises, the amount of which valuation they tendered the prosecutor, who refused to receive the same; and that they then paid the same into the Bank of Ireland, and that the lands in question thereby vested in the Company. *Held*, on demurrer, that such was a valid return, and that property of the sort described in the writ was a subject of compensation within the Lands Clauses Consolidation Act. [CRAMP-  
TON, J., *dubitante*.] Q. B. *Falls v. Belfast and Ballymena Railway Company* 184

2. *Held also*, that the words "such land," in the 94th section of that

## COMPETENCY.

statute, refer to the general heading of the enactment, and do not refer to land in a town, or land built upon, in the 93rd section. *Ibid*

### COMPETENCY.

See EVIDENCE, 3.

### COMPROMISE.

Parties may, at any time before judgment, compromise an action without the intervention of their attorneys. *Q. B. Harbison v. Wilcox* 500

### CONDITION.

See CONTRACT.

LIMITATIONS, STATUTE OF, 3, 4.

### CONFIRMATION.

See LEASE, 9.

### CONSIDERATION.

See BILL OF EXCHANGE.

### CONTRACT.

See ACCOUNT STATED.

EXCEPTIONS, BILL OF, 3, 4.

FRAUDS, STATUTE OF.

1. Contract for "the cargo of the ship S." is not a contract for the specific cargo of the S., and does not stand on the same footing as a contract for the sale of a specific chattel; such words imply a sale of the cargo, if it answer the description given by the purchaser. *Q. B. Malcomson v. Morton* 230
2. *Semble*.—If a party purchases an article, whether specific or not, the value of which is fluctuating and uncertain, on a stipulation that it is of a certain quality, he is at liberty to reject it if it does not agree with the description, and sue for the value which it would have borne if it had answered the description. *Ibid*
3. On a contract founded on this note: "Sold Messrs. M., &c., per Mr. C. C., the cargo of the Science from Smyrna, say about 1250 quarters of Indian corn, as per sample, at £12. 15s. per ton, payment cash, less one-half per cent., to be taken from alongside the vessel, free of charge except weighing

## CORONER.

7

and measuring;" and these words were added by the agent of the plaintiffs: "I agree to send boats alongside as soon as I hear of the vessel being ready to discharge." *Held*, that such words so added did not imply a condition, the performance of which it was necessary to aver in the declaration. *Ibid*

### CONVICTION.

A conviction under the statute 10 G. 4, c. 34, and which was headed "county of Galway, to wit," recited that the plaintiff was convicted before four of her Majesty's Justices of the Peace "for the said county, for that he P. S. did assault the police, on Saturday evening, the 22nd of July, at Ahascragh," without either naming the parties assaulted, or alleging that the place where the offence was committed was within the jurisdiction of the Justices. *Held*, that the conviction was ambiguous and bad. *L. E. Smith v. Mahon and another* 1

## CORONER.

A patent of *Jac.* 1 gave to the patentee, his heirs and assigns for ever, "All that the late dissolved monastery, &c., and also a marcett to be holden at the town of Newrie aforesaid, together with all tolls, &c., and also the assize of bread, ale and wine, and also one courte to be holden at the said town of Newrie, and in or within the precincts and liberties, &c., to be holden before the seneschal or seneschals of the patentee, his heirs, &c., together with power in the same Court to hold pleas of all and singular actions and trespasses, &c., not exceeding the value of 100 marks Irish; and also all and singular fines and amerciaments, &c., and knights' fees, wards, marriages, escheats, reliefs, heriots, fines, courtes leets, and views of frankpledge, and courtes baron belonging or appertaining, with the fines, amerciaments and profits thereof, wayffs, estraies, goods and chattels of felons, and of such as fly for felony, of felons

of themselves, outlaws and of condemned persons, and such as are put in exigent, &c., saving always the right, title, estate, claim and demand of all our loving subjects, of, in, or to the premises," &c. The patent granted a power to hold a court baron, and to appoint a seneschal, and "some such fit person as he or they shall think fit to be the bailiffe of the said manor," &c., "and that every of the said bailiffes for and during such time as he or they shall be bailiffe or bailiffes as aforesaid, shall and may have returne and execution of all manner of writts, executions, precepts, warrants, summons, attachments and mandates of us, our heirs and successors, &c., so as no sheriff, bailiffe or other minister of us, our heirs, &c., may enter into the said manor, &c., to execute, prosecute or serve any such like writts, precepts, warrants, summons, attachments, &c., which ought to be executed within the aforesaid manor," &c. *Held*, that the right of appointing a coroner did not thereby pass to the patentee. Q. B. *Boyd v. Magee* 166

## CORPORATION.

See EVIDENCE, 10, 11.

## PROCESS.

## WEIGHMASTER.

1. A lease was obtained from the Corporation of D. in 1785, by an Alderman of the Corporation, of certain premises, the subject of the ejectment, for a term of sixty-one years, which expired in 1846; this lease vested in a freeman of the Corporation, who, in 1842, prior to the Municipal Act coming into operation in D., surrendered it to the old Corporation on getting from them a new lease for ninety-nine years, at nearly one-half the rent reserved in the original lease, on payment of £700 as a fine. In an ejectment on the title to recover possession of these premises, brought by the existing Corporation, a resolution of the old Corporation was given in evidence, by which it was referred to viewers and auditors to report

what sum of money ought to be paid by way of fine for renewal, and tenants to be entitled to a lease upon the terms specified. *Held*, that the new lease for ninety-nine years was executed in pursuance of the resolution, and not by reason of any particular dealing or original contract entered into or made after the disabling statutes. Q. B. *Lessee Corporation of Drogheda, v. Holmes* 348

2. *Held also*, that such resolution came within the words of the statute 6 & 7 W. 4, c. 100, "in pursuance of some resolution." *Ibid*
3. All leases exceeding the period limited by the 3 & 4 Vic. c. 109, s. 12, made by a Corporation since 1836, are void, unless they come under the exceptions in that section. Q. B. *Lessee of the Corporation of Waterford v. Newport* 359

## COSTS.

See ATTORNEY, 3.

CRIMINAL INFORMATION, 2.

JURISDICTION, 1.

MANDAMUS, 2.

1. The rule that the Crown neither pays or receives costs, does not apply to cases in which, either on its part, or on that of the opposite party, a favour is sought from the Court; *ex gr.*, on a motion by the defendant, in a suit by the Crown, for leave to amend some of many pleas, to all of which a demurrer had been allowed, the Court permitted him to do so, only however upon the terms of paying the costs attendant upon the demurrer to all, and the costs of the motion. C. P. *Regina v. The Lord Bishop of Cork and another* 115
2. Upon the taxation of costs as between party and party, there is not any principle against the allowance of fees to Counsel for settling deeds of submission to arbitration in cases of importance. The Taxing-officer, having in such a case disallowed the expenses incidental to the employ-

ment of Counsel, was directed to review his taxation. C.P. *Booth v. Booth* 315

3. In ordinary cases under the Interpleader Act (9 & 10 Vic. c. 64), the Sheriff is not entitled to his costs. C.P. *Executors of Alexander v. Handy* 328

4. The plaintiffs had moved to set aside the demurrer to the replication as frivolous; the Court ordered it to be set down for argument, and reserved the question as to the costs of the motion. Although the defendant was successful upon the demurrer, yet it appearing upon affidavits that the plea was a sham plea, the Court refused him the costs of the motion to set aside his demurrer as frivolous. C.P. *Allingham v. Walker* 332

5. The plaintiff is entitled to the costs of an application to have the issues levied by the Sheriff, on a distringas against a corporation, estreated into Court, paid out of the said issues; and the Court will order the Sheriff to pay them out of the issues. Q.B. *Ransford v. The Great Southern and Western Railway Co.* 364, n.

6. In an action brought to recover penalties for receiving usurious interest, the defendant having obtained judgment as in case of a nonsuit, is not entitled to costs. Q.B. *Semple v. Gray* 508

#### COSTS, SECURITY FOR.

In an action upon a bill of exchange, where the plaintiff was not to be found, and was not known at the place mentioned by his attorney as his address; and it was sworn that he was a mere nominal plaintiff, and no mark for costs; the Court upon motion, ordered the proceedings to be stayed until security was given by the plaintiff for the costs already incurred and to be incurred, and ordered the plaintiff's attorney to pay the costs of the application. L.E. *Coatsworth v. Willington* 54

#### COUNSEL.

1. The Court will not allow a declaration to be amended by adding Counsel's signature to it, unless it is satisfactorily shown that the draft was submitted to Counsel, and that he by mistake omitted to sign it. L.E. *Harrison v. Kenny* 53

2. Upon the taxation of costs as between party and party, there is not any principle against the allowance of fees to Counsel for settling deeds of submission to arbitration in cases of importance; and the Taxing-officer, having in such a case disallowed the expenses incidental to the employment of Counsel, was directed to review his taxation. C.P. *Booth v. Booth* 315

#### COUNTERPLEADING.

See PLEADING, 28.

#### COVENANT.

See LEASE, 7.

SCIRE FACIAS, 3.

1. By indenture the defendant covenanted that he would not, without plaintiff's consent in writing, do or consent to any act whereby any or either, or any part or parts of the appointment, uses or trust in a certain deed should be in any way invalidated or prevented from taking effect; and that if his (the defendant's) father should die without having executed a certain deed of the 21st of July, that the defendant on request would do all such lawful and reasonable acts, whether by obtaining an Act of Parliament or otherwise, as should be advised by Counsel to be necessary or expedient for corroborating an indenture of equal date therewith; and further, that in the same event, viz., the death of defendant's father, without executing said deed of the 21st of July, if defendant should refuse or neglect in six months after that event, and after request, to do such lawful acts as Counsel should advise to be necessary for corroborat-

ing, as far as the defendant lawfully might, the deed of appointment, that he would, at the expiration of the six months, pay the plaintiff the full value of the interest intended to be vested in him by the deed of appointment and trust, with all damages caused by such neglect, and all sums expended on the faith of the said deed of appointment. In a declaration on this covenant the breach assigned on the first clause of this covenant was, that the defendant, after his father's death, presented a petition to the House of Lords and obtained an Act of Parliament, whereby the premises were vested in certain trustees in fee, in trust to sell them, or a competent part of them, to pay debts and incumbrances. *Held*, that the procuring said Act of Parliament was a breach of the first covenant. Q. B. *Crommelin v. The Marquis of Donegal* 423

2. The declaration stated that plaintiff was advised by Counsel that it was necessary and expedient to obtain an Act of Parliament to confirm the deed; that the defendant had notice thereof, and was requested to procure it so far as he lawfully might. *Held*, that this breach was well assigned, and that the two clauses constituted distinct averments. But even if it were but a single averment, the declaration stated a substantial breach of it. *Ibid*

3. In an action for breach of covenant by obstructing the tenants of plaintiff in the enjoyment of an easement, the plaintiff was required to furnish a bill of particulars of the obstructions; the times of their occurrence, the names of the tenants obstructed, and the mode of obstruction. C. P. *Wildridge v. Clarke* 589

#### CRIMINAL INFORMATION.

1. The affidavit to ground a criminal information for provoking a party to commit a breach of the peace by fighting a duel, should in all cases state

#### DEMAND, &c.

that such was the intention of the party. Q. B. *Regina v. Kelly* 217

2. The Court will not, after a trial, alter a record so as to make it appear that a criminal information was filed at the instance of a private prosecutor, but will direct the officer to tax the costs on making up the judgment. Q. B. *Regina v. Cavendish* 511

#### CROWN.

The rule, that the Crown neither pays or receives costs, does not apply to cases in which, either on its part or on that of the opposite party, a favour is sought from the Court; *ex gr.*, on a motion by the defendant in a suit by the Crown for leave to amend some of many pleas, to all of which a demurrer had been allowed, the Court permitted him to do so, only however, upon the terms of paying the costs attendant upon the demurrer to all, and the costs of the motion. C. P. *Regina v. The Bishop of Cork* 147

#### DEAN.

See BISHOP, 1, 2.

#### DECISIONS COMMENTED ON.

Plaintiff below, becoming plaintiff above, is not required to give bail in error. The conflicting decisions in *Dawson v. M'Entyre* (3 Ir. Law Rep. 443), and *Stephenson v. Higginson* (Bl. Dun. & Osb. 37), considered. C. P. *Watters v. Lidwill* 322

#### DECLARATION.

See COUNSEL, 1.  
PLEADING.

#### DEEDS AND CONVEYANCES.

See COSTS, 2.

#### DE INJURIA.

See PLEADING, 33, 34.

#### DEMAND OF POSSESSION.

Where a tenant after the execution of an *habere* was allowed to remain in possession under the provisions of

## DEMURRER.

9 & 10 Vic. c. 111, s. 8, the Court will not order the *habere* to be renewed without a previous demand of possession. Q. B. *Lessee Knox v. Gildea* 198

## DEMURRER.

See COSTS, 4.

### PLEADING.

1. A defendant cannot demur to a declaration upon a single cause of action, after having paid money into Court subsequently to the filing of it. L. E. *Hynes v. Shannons* 25
2. The Court refused, with costs, an application to set aside a demurrer taken after nearly twelve months had elapsed, and a rule for *non pros.* had been entered to a plea, on the ground that to a declaration in trespass against two, they pleaded jointly that they were "not guilty," without adding "nor either of them." L. E. *Murray v. Lowry and another* 49
3. Where a party pleads and demurs at the same time to the same count, the demurrer is overruled by the plea, and will be struck out. L. E. *Samuels v. Atkinson* 50
4. The argument on one point of a demurrer having terminated, the Court refused, with respect to that point at least, to listen to an objection, then first made, that the demurrer was too large. But that objection was afterwards allowed to prevail with respect to the subsequently argued points of demurrer. C. P. *Guardians of Ballinrobe Union v. Browne* 561
5. A demurrer to a declaration containing several counts commenced thus: "And the defendant, by, &c., comes, &c., and saith that the said declaration, and the matters therein contained, in manner and form as the same are above stated, are not sufficient in law;" and then proceeded to assign causes of demurrer to each count separately. *Held*, that as some of the counts (*semble*) were good, the demurrer was too large, and must be overruled accordingly. *Ibid*

## DEPOSIT.

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6. A count in an action against an immediate lessor, for poor's rate, stated that the defendant became liable to pay the amount of the said rate so remaining due and unpaid as aforesaid by the defendant in respect of the said hereditaments, situate, &c., for which respectively he as such immediate lessor was, by virtue of a certain Act of Parliament, "in due form of law rated as aforesaid." Whether this referential averment, in the absence of any other allegation that the defendant was rated, is sufficient, *Quere?* A special demurrer to this count, assigning as cause of demurrer, that the count did not state "how, or in what manner the rate was imposed, or how the defendant is liable to the said rate," was held not to point out with requisite precision the inaccuracy of the above referential averment. *Ibid*

## DEPOSIT.

Where a party signed the subscribers' agreement and the parliamentary contract, for a projected railway, which agreement appointed a managing committee, and gave power to the directors to declare shares forfeited if the deposits were not paid, to supply vacancies in their body, the majority to bind the residue, and empowered them to carry out the undertaking, to make contracts and agreements, to apply for an Act of Parliament, to relinquish and wind up, if necessary, the undertaking, and apply the moneys deposited in payment of the expenses to be incurred, as they should think fit, and to invest the deposits and apply them for the undertaking; and where it appeared that some expenditure was incurred before the Committee of the House of Lords, but no evidence was given of the winding up of the affairs or of any other expenditure, the bill for this railway having been thrown out by the House of Commons:—*Held*, that a shareholder who had paid the required deposit on his shares could not recover it from one of the provisional committee in an action for

money had and received. Q. B. *Daly v. Rooney* 487

## DESCENT.

See PLEADING, 23, 24.

## DESERTION.

See COMMITTAL.

## DEVISE.

See EVIDENCE, 17, 18, 19.

A by his will devised certain estates, in the following words :—" Whenever it happens that the A estate, by want of male heirs, to wit, of J. J. R., or by any other contingency, reverts back to me, I hereby leave it in as full a manner as I can convey it, to my nephew W. R., to be enjoyed by him and his lawful begotten heirs male for ever." *Held*, that such words passed only an estate in tail male. Q. B. *O'Brien v. Roche* 149

## DIGNITARY.

See BISHOP.

## DISTRINGAS.

See BOROUGH COURT, 1, 2.  
ESTREAT OF ISSUES.  
PROCESS.

## EASEMENT.

See COVENANT, 3.

## ECCLESIASTICAL LEASES.

See LEASES, 9, 10.

## EJECTMENT ON THE TITLE.

See BISHOP.

CORPORATION, 1, 2, 3.  
EVIDENCE, 17.

## EJECTMENT FOR NON-PAYMENT OF RENT.

See DEMAND OF POSSESSION.  
NOTICE OF RENT DUE.

## EMBEZZLEMENT.

See GOVERNMENT STOCK.  
BAIL IN ERROR.  
BOROUGH COURT.

1. Where a plea of confession accompanied by a release of errors was given,

and afterwards a declaration was filed for the purpose of entering up judgment upon that plea, which declaration was intituled of a Term subsequent to that of the appearance, upon motion grounded upon two notices; the one unjustly imputing to the plaintiff a breach of faith in marking the judgment, and the other alleging that the judgment had been marked without any capias having been sued out; the Court refused to set aside the judgment. (TORRENS, J., *dissentiente*.) C. P. *Cochrane v. Comyn* 71

2. *Held, per JACKSON, J.*, that the fact of the declaration being intituled of a Term different from that of the appearance, amounted not only to irregularity but also to error, and as such was released. (TORRENS, J., *dissentiente*.) BALL, J., and DOHERTY, C. J., *dubitantibus*. *Ibid*
3. Whether the second notice of motion pointed out with sufficient precision the last-mentioned defect in the proceedings, *Quære?* *Ibid*
4. The Court will not on motion order the recognizance of a plaintiff in error in the Exchequer Chamber, and of his sureties, to be vacated, although the judgment of this Court be reversed, while a writ of error is pending to the House of Lords. Q. B. *Smith v. Darley* 505

## ESTATE TAIL.

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## ESTREAT.

Where, in default of appearance to an action brought against a member of

Parliament, full issues are returned by the Sheriff, the proper practice is to have the issues returned into this Court. Q. B. *Belfast and Ballymena Railway Company v. Ross* 363

See also *Ransford v. Great Southern and Western Railway Co.* 364, n.

## EVIDENCE.

1. An unaccepted proposal for a lease made by one C. F. (whose personal representative the defendant was) to the parties from whom the lessors of the plaintiff derived, such proposal having been signed by a third party for and in the presence of C. F., who was from illness unable to write, was evidence of an acknowledgment of title within the statute 3 & 4 W. 4, c. 27, s. 14. L. E. *Lessee Corporation of Dublin v. Judge* 8
2. A being indebted to B in several sums of money, C, the son of A, enters into the following guarantee in a letter written by him to B:—"At the request of my father, who informs me of your having proceeded on a certain judgment obtained by you against him, contracted by an advance made by you to W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof both my father and myself expect your demand will be paid and discharged: if, however, contrary to this expectation, there may be any disappointment in the payment of it, I hereby engage to pay or secure, in the event of my father dying before the demand can be satisfied, provided no further proceedings are carried forward or taken; and at the same time I have to inform you, that my father and myself intend submitting in a short time an arrangement to his creditors, which we confidently hope will meet their wishes, and which, when submitted to you, I shall of course consider this letter of no effect." This letter being objected to by B as an insufficient guarantee, the following letter was then written

by C, addressed to B:—"At the request of my father, who informs me of your having proceeded on a certain judgment obtained against him by you for an advance made to the late W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof we had hoped your claim would have been discharged. Should, however, my father's death take place before an offer can be made to you, together with other creditors, for the payment of both you and them, to the extent within my power to accomplish, and which I am making every exertion to effect as soon as possible, I shall consider myself bound to pay you such an amount, agreeable to your wishes of being secured against the casualty I have mentioned occurring before an arrangement could be offered, provided all proceedings cease." The first three counts of a declaration, founded on the first of these letters, set out the consideration thus:—"That no further proceedings should be carried forward or taken by B against A on the judgment, and that B would give time to A in his lifetime for the payment of said sum of money; and the fourth count set forth a similar consideration on the latter of these letters. *Held*, that the letters did not sustain the declaration, the true meaning of the guarantee being, that all proceedings in the suit of R. H. F. should cease. Q. B. *Carr v. Dunne*

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*Held also*, that the two letters did not constitute one guarantee, but that the one was a substitution for the other. *Ibid*

3. D. on his marriage in 1819, executed bonds to his trustees, payable at his death, and not in his lifetime, save at the option of his trustees. B having obtained a judgment against A, assigned it to D, who assigned this judgment over to his trustees as part payment of those bonds. D. then filed a charge on foot of this judgment in a cause then pending in the Court

of Chancery, in the name of B, and in B's name instituted an action on the above guarantees. *Held*, D. was an incompetent witness in such action, he being a person in whose immediate and individual behalf the action was brought. Q. B. *Carr v. Dunne* 202

4. A declaration averred a bargain and sale of Indian corn, as per sample, at the rate of £12. 15s. per ton, and alleged as breach the non-delivery of the corn. At the trial this question was put to a witness, "Whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn as distinguished from its condition?" *Held*, that this was not a legal question, and was properly objected to, because the words, "as per sample" in the contract are unambiguous, and no usage of trade can be admitted to vary or contradict the plain terms of a contract. Q. B. *Malcomson v. Morton* 230
5. Where in an action of debt for rent by the assignee of a reversion of a lease for lives renewable for ever, against the assignee of an under-lessee, the declaration averred that the reversioner was seised in his demesne as of freehold to him and his heirs for the term of two lives, by virtue of a lease originally for three lives, "and which said lease has been kept on foot and continued, and is still subsisting;" and that being so seised, the reversioner made the under-lease. *Held*, that such averment was sufficient, and that it was unnecessary to set out any of the renewals of the original lease, and that under the 5 G. 2, c. 4, such averment was sustained in evidence by the renewals, though the renewals showed that all the lives in the original lease had long dropped. Q. B. *Moore v. Maguire* 272
6. The declaration contained the usual averment, that all the under-lessee's interest came to the defendant by

assignment, and the defendant by plea traversed the assignment; and the original lease contained a clause by which the head landlord reserved to himself a power to re-assume into his possession a portion of the demised premises, making a proportional abatement of rent; and the under-lease contained a proviso, that the under-lessee and his assigns should be bound by such clause; and the evidence to charge the defendant with the assignment was, that he had been in possession of all the premises in the under-lease, except the part which the landlord had taken possession of pursuant to the power, and had paid the rent reserved by the under-lease. *Held*, that the issue was sufficiently sustained on the part of the plaintiff by such evidence, and that there was no variance. *Ibid*

7. The under-lease contained a clause subsequent to the reservation clause, in which the reversioner agreed to accept a reduced rent so long as the lessees, &c., should not build. The declaration claimed the larger rent, though it appeared on the evidence that the lessees, &c., had not built. *Held*, that it was unnecessary to refer in the declaration to this agreement, and that there was no variance. *Ibid*
8. To a declaration of debt on a bond, bearing date in 1806, the defendant pleaded the usual plea of *solvit post diem*; and at the trial, the plaintiff having failed to give evidence that any suit had been commenced or prosecuted for the recovery of the said debt, or any payment of principal or interest, or other satisfaction made on account of said bond, within twenty years before the commencement of the suit, *Held*, that the Judge ought not to have left the question of payment to the jury, but to have directed a verdict for the defendant. (*Dissentientibus* CRAMPTON, J., and PENNEFATHER, B.) Ex. Ch. *Exors. Kemmis v. Macklin* 372
4. A, by indenture, demised to B certain lands, *habendum* for three lives,

at the yearly rent of £187, with the usual clause of distress and re-entry for non-payment of this rent. The lease also contained an agreement by B not to sublet or assign without leave first obtained under the hand and seal of A, and that so long as B should perform the covenants and agreements therein contained, A would be content with the yearly rent of £93. 15s. 2d., payable on the same days as the first reserved rent of £187. *Held*, that the larger rent thereby reserved was not a penal rent, and that ejectment was maintainable for its non-payment; and that general evidence of the change of possession was sufficient proof of the breach of the clause against subletting, and that it lay on the tenant to rebut that evidence. Q. B. *Lessee Lord Ashdown v. White* 400

10. A Corporation executed a lease on which an ejectment was brought, which lease was signed by the members of the Corporation individually, and purported to be made "under their seal." There was no evidence that they possessed a common seal. *Held*, that the body being assembled when the seal was affixed, it was their common seal *pro hac vice*, and that the lease was admissible in evidence against them. Q. B. *Lessee Jones v. Galway Town Commissioners* 435

11. *Held*, that this lease purporting to be executed by the head and subordinate members of the Corporation, the Court would presume that the entire body corporate were present at its execution, no evidence being offered to the contrary. *Ibid*

12. To a *scire facias* defendant pleaded that a present right to receive the money secured by the judgment accrued to the conusee more than twenty years before the suing out the writ; the plaintiff replied that the judgment was obtained on a *post obit* bond, traversing that a present right to recover the money secured by the judgment accrued more than twenty

years before the suing out the writ; on this, issue in fact was taken. *Held*, that the production of a bond, agreeing in all respects with that on which the judgment had been entered, was *prima facie* evidence that it was the same bond as that on which the judgment had been entered. Q. B. *Gilman v. Chute* 442

13. *Held also*, that the condition of the bond being given in evidence, it did not contradict the record, and was properly admissible to show that the bar created by the Statute of Limitations did not arise. *Ibid*

14. *Held also*, that the defendant having taken issue on the fact, could not aver the record precluded enquiry. *Ibid*

15. After the dissolution of a partnership, an account by a member of the partnership, authorised to wind up the affairs of the partnership, and signed by him in the name of the firm, furnished to a creditor of the partnership, and admitting their liability to an extent therein stated; *Held*, not sufficient evidence of a new contract, so as to remove the bar created by the Statute of Limitations (9 G. 4, c. 14), and make another member of the partnership liable on foot of it. Q. B. *Bristow v. Miller* 461

16. *Held also*, that this account was at most but an acknowledgment of a debt, and not being signed by the defendant, was not sufficient evidence of a new contract within the meaning of the statute. *Ibid*

17. In an ejectment on the title, brought to recover "the Dummilly estate," the will of the Bishop of Ferns, who was in possession of and residing at Dummilly-house in 1786, was given in evidence; and by that will he devised all the lands and hereditaments of which he was seised in the county of Armagh to N. A. Cope and Sarah his wife, for their joint lives, and the survivor, with remainder to their first and other sons in tail male,

with remainder to their issue female. The will also contained a power to tenants for life to create a charge not exceeding £4000. The lessor of the plaintiff was sole daughter of that marriage, and claimed under the second remainder in tail. *Held*, that evidence of the Bishop's possession of one denomination of the estate, viz., a lease of Lissheffield, and payment and receipt of rent under that lease, was admissible as evidence of possession of the whole estate by the Bishop, coupled with evidence of the receipt of rents from 1795 to the period of the death of the last tenant for life, out of the whole lands which were known as the Dummilly estate. Q. B. *Lessee Garland v. Cope* 514

18. The power of charging was exercised in 1818 by the tenant for life; and in 1838 a younger son, not in possession, executed a deed assigning a sum of £1000, part of his portion of the £4000 charged on the estate. *Held*, that the deed of 1818 was admissible in evidence as being against the interest of the party making it; it is not merely a declaration by the tenant for life, but a substantive act done by the possessor of the estate. *Ibid*

19. *Held*, that the deed of 1838 was admissible on the same principle, as being executed by a person interested in the estate, both deeds showing the Dummilly estate was enjoyed under the limitations in the will, and therefore evidence of seisin in fee of the Bishop of the whole. *Ibid*

#### EXCEPTIONS.

1. The mode of taking and sustaining exceptions commented on. L. E. *Power v. St. George* 79

2. A bill of exceptions stating merely what the Judge refused to do is improperly framed, and should contain a statement of what his charge was, and wherein it was objectionable. Q. B. *Malcomson v. Morton* 230

3. An exception stating that a direction was called for, "that the plaintiffs repudiated a contract by refusing to accept a cargo," is asking for a direction to the jury on a matter of fact, and therefore untenable. *Ibid*

4. Where the contract was an entire contract "for the cargo of the ship S.," and a direction was called for, "that if the jury believed the plaintiffs refused to take that cargo, they should find for the defendant," and the exception only set out that the Judge refused so to direct: *Held*, that such exception should have specified how the Judge did direct the jury. *Ibid*

#### EXCHEQUER CHAMBER.

*See ERROR, 4.*

#### EXECUTOR.

1. Assumpsit by an executor, for use and occupation in the lifetime of his testator, and upon an account stated between the defendant and the executor. Promise to the executor to pay to him the said several moneys on request; Breach, "yet the defendant hath disregarded his promise, and hath not paid any of the said moneys, or any part thereof." Special demurrer—first, because it was not alleged that the sum claimed was due to the testator in his lifetime; secondly, because the breach did not distinctly negative any payment to the testator. *Held*, that the declaration was good. C.P. *Executor Purdon v. Leavy* 63

2. The Court will not, as against an executor *de son tort*, permit the revival of a judgment. C.P. *O'Malley v. O'Malley* 78

#### EXECUTOR DE SON TORT.

*See EXECUTOR, 2.*

#### EXECUTION.

*See INTERPLEADER.*

#### SHERIFF'S RETURN.

Where after final judgment one of several co-plaintiffs dies, the survivors

may (without issuing a *scire facias*) sue out execution by first entering upon the roll a suggestion of the death of the party. *L. E. Major and others v. Lynch* 62

## FALSE IMPRISONMENT.

See CONVICTION.

## FEES.

See COUNSEL, 2.

## FEME SOLE.

See HUSBAND AND WIFE.

## FL FA.

See INTERPLEADER.

SHERIFF'S RETURN.

## FRAUDS, STATUTE OF.

The plaintiff in the first count of the declaration stated, that being tenant from year to year under Sir R. B. St. G. of certain premises, comprising a dwelling-house, offices and land, he owed his landlord a certain sum for rent; that the defendant R. St. G., who was the agent of Sir R. B. St. G., had obtained a judgment in an action of assumpsit for a sum which included the sum due to Sir R. B. St. G. for rent; that having been arrested under a *ca. sa.* on foot of this judgment, the plaintiff delivered and gave up to the defendant as such agent the possession of the said demised lands and premises, with their appurtenances, and divers crops and valuables, in full satisfaction and discharge of the damages, costs, and charges, so adjudged to the defendant, together with poundage and all lawful expenses, being the whole amount lawfully due or demandable of and from the plaintiff by the defendant under the writ; and that the defendant then and there accepted and received the same in full discharge and satisfaction of the said damages, &c., and then and there agreed to instruct the Sheriff that the same was satisfied, and to give authority to the Sheriff to discharge the plaintiff, but did not, whereby the plaintiff was further detained in cus-

tody. The second count was the same, except that it omitted the averment of the delivery of possession of the lands and premises. The third and fourth counts were the same in other respects as the first and second, but omitted the agreement to discharge, and averred that upon the delivery in satisfaction the plaintiff was thereupon entitled to be discharged, but was not. The fifth count was the same as the first, but omitted the averment of tenancy, or that the amount recovered by the judgment included the sum due to Sir R. B. St. G. Plea, the general issue; verdict for the plaintiff. *Held*, that the obligation to discharge the plaintiff having arisen upon a contract executed, it was not void under the Statute of Frauds, by reason of the agreement not having been reduced to writing, and signed by the party. *L. E. Power v. St. George* 79

## GAMBLING DEBT.

See PLEADING, 35.

## GENERAL RULE.

"It is ordered, for the future, that in all informations to be filed by the coroner and attorney of this Honorable Court, that the name of the person at whose instance same has been granted be inserted therein, in the nature of a relator or prosecutor, as the case may be." *Q. B. Regina v. Cavendish* 513

## GOVERNMENT STOCK.

1. An indictment stated that R. C. entrusted to the traverser, being a broker and agent, for a special purpose, a certain valuable security, to wit, a certain amount of Government stock, to wit, the sum of £9000 in the new £3½ per centum annuities, the said special purpose being as follows—that is to say, that the £3½ per cent. annuities should be exchanged for two portions of two other stocks, to wit, £5000, one part thereof to be exchanged for so much of the £3 per cent. consolidated annuities as

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should be equivalent to £5000 of the £3½ per cent. annuities, and £4000 to be exchanged for so much of the £3 per cent. reduced annuities as should be equivalent to £4000 £3½ per cent. annuities, and said stocks to be transferred into the name and to the credit of R. C., without any authority to the traverser to sell, negotiate, transfer, or pledge the said £9000 £3½ per cent. annuities; and that the traverser, in violation of good faith, and contrary to the purpose for which the £9000 were entrusted to him, unlawfully sold and converted the same to his own use. *Held*, that stock in the £3½ per cent. annuities is not a valuable security within the meaning of 9 G. 4, c. 55, under which this indictment was framed. Q. B. *Regina v. Lanauze* 407

2. *Held also*, that the indictment, averring a total absence of authority to sell, transfer, negotiate, or pledge, was at variance with the special purpose for which it alleged the annuities to have been entrusted to the traverser, and that therefore judgment should be arrested. *Ibid*

#### GRAND JURY CESS.

The occupier of a stall in the market of the city of Cork, for which he pays a weekly rent to the Corporation of Cork, who are the owners in fee of the soil, and who preserve a general control over the market, is liable to be rated to grand jury cess; he occupying it by the sale of meat during the day, leaving in it at night a desk under lock and key, and other property; and the circumstance of the servants of the Corporation shutting the outer gates in the evening, so that none but the servants of the Corporation can remain therein during the night, does not affect the occupier's liability. Q. B. *Waugh, petitioner; The Treasurer of Cork, respondent* 451

#### GUARANTEE.

1. A being indebted to B in several sums of money, C, the son of A, enters into

#### GUARANTEE.

the following guarantee in a letter written by him to B:—"At the request of my father, who informs me of your having proceeded on a certain judgment obtained by you against him, contracted by an advance made by you to W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof both my father and myself expect your demand will be paid and discharged: if, however, contrary to this expectation, there may be any disappointment in the payment of it, I hereby engage to pay or secure, in the event of my father dying before the demand can be satisfied, provided no further proceedings are carried forward or taken; and at the same time I have to inform you, that my father and myself intend submitting in a short time an arrangement to his creditors, which we confidently hope will meet their wishes, and which, when submitted to you, I shall of course consider this letter of no effect." This letter being objected to by B as an insufficient guarantee, the following letter was then written by C, addressed to B:—"At the request of my father, who informs me of your having proceeded on a certain judgment obtained against him by you for an advance made to the late W. M., which judgment you have proved under proceedings at the suit of R. H. F., and under which proof we had hoped your claim would have been discharged. Should, however, my father's death take place before an offer can be made to you, together with other creditors, for the payment of both you and them, to the extent within my power to accomplish, and which I am making every exertion to effect as soon as possible, I shall consider myself bound to pay you such an amount, agreeable to your wishes of being secured against the casualty I have mentioned occurring before an arrangement could be offered, provided all proceedings cease." The first three counts of a declaration, founded on the first of these letters, set

## GUARANTEE.

out the consideration thus:—"That no further proceedings should be carried forward or taken by B against A on the judgment, and that B would give time to A in his lifetime for the payment of said sum of money; and the fourth count set forth a similar consideration on the latter of these letters. *Held*, that the letters did not sustain the declaration, the true meaning of the guarantee being, that all proceedings in the suit of R. H. F. should cease. Q. B. *Carr v. Dunne*

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2. *Held also*, that the two letters did not constitute one guarantee, but that the one was a substitution for the other. *Ibid*

3. D. on his marriage in 1819, executed bonds to his trustees, payable at his death, and not in his lifetime, save at the option of his trustees. B having obtained a judgment against A, assigned it to D., who assigned this judgment over to his trustees as part payment of those bonds. D. then filed a charge on foot of this judgment in a cause then pending in the Court of Chancery, in the name of B, and in B's name instituted an action on the above guarantees. *Held*, D. was an incompetent witness in such action, he being a person in whose immediate and individual behalf the action was brought. *Ibid*

## GUARDINS, POOR-LAW.

*See* PLEADING, 12, 13, 14, 18, 19, 20.

## HABERE.

Where a tenant after the execution of an *habere* was allowed to remain in possession under the provisions of 9 & 10 Vic. c. 111, s. 8, the Court will not order the *habere* to be renewed without a previous demand of possession. Q. B. *Lessee Knox v. Gildea*

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## HIBERNIAN JOINT-STOCK COMPANY.

*See* PLEADING, 11.

## INDICTMENT.

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### HUSBAND AND WIFE.

Where an interlocutory judgment had been obtained against a *feme dum sole*, and before final judgment, she marries, the proper course is to enter a suggestion, and there is no necessity to apply for a *scire facias* to revive the judgment. Q. B. *Coates v. Shields and wife*

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### IMMATERIAL ISSUE.

*See* PLEADING, 26.

### INDEMNITY.

*See* GUARANTEE.

### INDENTURES.

*See* APPRENTICE.

## INDICTMENT.

1. An indictment stated that R. C. entrusted to the traverser, being a broker and agent, for a special purpose, a certain valuable security, to wit, a certain amount of Government stock, to wit, the sum of £9000 in the new £3½ per centum annuities, the said special purpose being as follows—that is to say, that the £3½ per cent. annuities should be exchanged for two portions of two other stocks, to wit, £5000, one part thereof to be exchanged for so much of the £3 per cent. consolidated annuities as should be equivalent to £5000 of the £3½ per cent. annuities, and £4000 to be exchanged for so much of the £3 per cent reduced annuities as should be equivalent to £4000 £3½ per cent annuities, and said stocks to be transferred into the name and to the credit of R. C., without any authority to the traverser to sell, negotiate, transfer, or pledge the said £9000 £3½ per cent. annuities; and that the traverser, in violation of good faith, and contrary to the purpose for which the £9000 were entrusted to him, unlawfully sold and converted the same to his own use. *Held*, that stock in the £3½ per cent. annuities is not a valuable security within the meaning of 9 G. 4, c. 55, under which th'

## INDICTMENT.

indictment was framed. Q. B. *Regina v. Lanauze* 407

2. *Held also*, that the indictment, averring a total absence of authority to sell, transfer, negotiate, or pledge, was at variance with the special purpose for which it alleged the annuities to have been entrusted to the traverser, and that therefore judgment should be arrested. *Ibid*

## INDORSEE.

See BILL OF EXCHANGE.

## INDUCEMENT.

See PLEADING, 29.

## INFORMATION.

See CRIMINAL INFORMATION.

## INTERLOCUTORY JUDGMENT.

See SUGGESTION.

## INTERPLEADER.

1. In order to enable the Sheriff to move for an interpleader order under statute 9 & 10 Vic. c. 64, notice of the intended motion must be given as well to the execution creditor as to all the adverse claimants of the goods seized under the *fi. fa.* by the Sheriff. C. P. *Alexander v. Connell* 325
2. To entitle him to such an order, an application to the Court, or a Judge in Chamber, must be made by the Sheriff at an early period after he has been made acquainted by the parties with their respective claims. *Ibid*
3. Form of order calling upon the rival claimants to appear before the Court, where they have not appeared upon a special motion by the Sheriff for an order of interpleader. *Ibid*
4. Where under the Interpleader Act a Sheriff has been permitted to lodge in Court moneys levied by virtue of a *fi. fa.*; in the contest before the Court for that sum between the execution creditor and the counter-claimant, the right to begin rests with the latter. C. P. *Alexander v. Handy* 328

## JURISDICTION.

5. In ordinary cases under this Act the Sheriff is not entitled to his costs. *Ibid*
6. Form of order directing an issue between the adverse claimants. *Ibid*
7. The time for disputing the Sheriff's right to the protection of the Court is when he first applies for the order to interplead. If the adverse claimants have appeared in Court upon that motion, it is too late for them afterwards to impugn the Sheriff's right to relief when the money has been lodged in Court. *Ibid*

## IRREGULARITY.

See ATTORNEY, 2.

SETTING ASIDE PROCEEDINGS, 1, 4, 7.

## ISSUE.

See EVIDENCE, 14.

INTERPLEADER, 6.

## JOINDER.

In an action for poor's-rate, brought against an immediate lessor by the Guardians of the Union, the plaintiffs may combine in one declaration, or in one count of it, claims for rate due from the defendant in respect of several Electoral Divisions of that Union. *Semble*, in this case, and so *Held* in *Castlebar Union v. Browne* (*infra*, in *notis*.) C. P. *Guardians of Poor of Ballinrobe Union v. Browne* 546

## JUDGMENT.

See EXECUTOR, 2.

PLEADING, 36.

SCIRE FACIAS, 1, 2, 3.

SETTING ASIDE PROCEEDINGS, 7.

SUGGESTION.

## JURISDICTION.

1. This Court has no jurisdiction to review the taxation of costs by the Master under the Lands Clauses Consolidation Act (1845), 8 Vic. c. 18, s. 52. Q. B. *Tennant v. The Mayor and Burgesses of Belfast* 290

## JURISDICTION.

2. This Court will not grant a mandamus to the Master of this Court, commanding him to review his taxation of costs under the 8 Vic. c. 18. Q. B. *In re Scully v. Great Southern and Western Railway Company* 292
3. Where a peculiar jurisdiction is given by statute, that does not exclude the Common Law jurisdiction of this Court, unless there be an express exclusion. Q. B. *Lessee of the Corporation of Waterford v. Newport* 359

## JURY.

See SPECIAL JURY.

## JUSTICES.

See MAGISTRATES.

## JUSTIFICATION.

In a plea justifying trespass under process of an Inferior Court, it is not enough to state that the defendant levied his plaint for a cause of action arising within the jurisdiction of such Court; the plea should also show that the trespasses complained of were committed within the jurisdiction. Q. B. *Butler v. Bianconi* 286

## LANDLORD AND TENANT.

See LEASE.

PLEADING, 37.

## LANDS CLAUSES CONSOLIDATION ACT.

1. A writ of mandamus recited the B. and B. Railway Act, and its incorporation with the Lands Clauses Consolidation Act, and Railway Clauses Act, and after setting out the 68th section of the last Act, stated that the prosecutor was in the occupation of a piece or parcel of ground adjoining the said railway, &c.; and also in occupation of another piece or plot of ground, strand or slob, adjoining, &c., and running back to low-water mark in the Belfast Lough, &c.; and that he had erected a dwell-

## LANDS CLAUSES, &c. 21

ling-house, &c., and that his principal inducement for so doing was the situation of said property contiguous to the sea, affording facilities for the enjoyment of sea bathing, fishing and shooting; that the Railway Company had raised an embankment upon and over a portion of the lands in his occupation, and by reason thereof he and his family were excluded access to the sea; that by notice he had called on the Company, specifying the accommodation works required to be made by them in consequence of the interruption to the use of his lands, &c.; and that they were not works with respect to which he had agreed to receive compensation instead of the making of said works; that the Company declined to execute the same: and concluded by commanding the Company to make such communication under the railway as should be necessary for the purpose of making good the interruption caused by the railway to the use of the lands in the prosecutor's occupation. The return set out several notices to treat, served by the Company on the prosecutor for the purchase of his lands, and then set out the 94th section of the Lands Clauses Consolidation Act, and averred that the land divided by the railway embankment was and is of much less value than the expense of making a communication between the intersected lands; that the Company called on him to sell the said piece of land, and that the prosecutor failed to treat, and that they then offered him compensation, and he declining, they summoned a jury to assess the compensation; that the prosecutor did not attend before the jury, and that the Company then required a surveyor to make the necessary valuation of the premises, the amount of which valuation they tendered the prosecutor, who refused to receive the same; and that they then paid the same into the Bank of Ireland, and that the lands in question thereby vested in the Company. *Held*, on

demurrer, that such was a valid return, and that property of the sort described in the writ was a subject of compensation within the Lands Clauses Consolidation Act. [CRAMP-  
TON, J., *dubitante*.] Q. B. *Falls v. Belfast and Ballymena Railway Company* 184

2. *Held also*, that the words "such land," in the 94th section of that statute, refer to the general heading of the enactment, and do not refer to land in a town, or land built upon, in the 93rd section. *Ibid*
3. The Court has no jurisdiction to review the taxation of costs by the Master, under the Lands Clauses Consolidation Act. Q. B. *Tennant v. The Belfast and Ballymena Railway Company* 290
4. The Court will not grant a mandamus to the Master of this Court, commanding him to review his taxation of costs under the 8 Vic. c. 18. Q. B. *In re Scully v. The Great Southern and Western Railway Company* 292

## LEASE.

See LIMITATIONS, STATUTE OF, 1.  
PLEADING, 5, 6, 7, 37.

1. A lease was obtained from the Corporation of D. in 1785, by an Alderman of the Corporation, of certain premises, the subject of the ejectment, for a term of sixty-one years, which expired in 1846; this lease vested in a freeman of the Corporation, who, in 1842, prior to the Municipal Act coming into operation in D., surrendered it to the old Corporation on getting from them a new lease for ninety-nine years, at nearly one-half the rent reserved in the original lease, on payment of £700 as a fine. In an ejectment on the title to recover possession of these premises, brought by the existing Corporation, a resolution of the old Corporation was given in evidence, by which it was referred to viewers and auditors to report what sum of money ought to be paid

by way of fine for renewal, and tenants to be entitled to a lease upon the terms specified. *Held*, that the new lease for ninety-nine years was executed in pursuance of the resolution, and not by reason of any particular dealing or original contract entered into or made after the disabling statutes. Q. B. *Lessee Corporation of Drogheda v. Holmes* 348

2. *Held also*, that such resolution came within the words of the statute 6 & 7 W. 4, c. 100, "in pursuance of some resolution." *Ibid*
3. All leases exceeding the period limited by the 3 & 4 Vic. c. 109, s. 12, made by a Corporation since 1836, are void, unless they come under the exceptions in that section. Q. B. *Lessee of the Corporation of Waterford v. Newport* 359
4. A, by indenture, demised to B certain lands, *habendum* for three lives, at the yearly rent of £187, with the usual clause of distress and re-entry for non-payment of this rent. The lease also contained an agreement by B not to sublet or assign without leave first obtained under the hand and seal of A, and that so long as B should perform the covenants and agreements therein contained, A would be content with the yearly rent of £93. 15s. 2d., payable on the same days as the first reserved rent of £187. *Held*, that the larger rent thereby reserved was not a penal rent, and that ejectment was maintainable for its non-payment. Q. B. *Lessee Lord Ashtown v. White* 400
5. A Corporation executed a lease on which an ejectment was brought, which lease was signed by the members of the Corporation individually, and purported to be made "under their seal." There was no evidence that they possessed a common seal. *Held*, that the body being assembled when the seal was affixed, it was their common seal *pro hac vice*, and that the lease was admissible in evi-

dence against them. Q. B. *Lessee Jones v. The Galway Town Commissioners* 435

6. *Held*, that this lease purporting to be executed by the head and subordinate members of the Corporation, the Court would presume that the entire body corporate were present at its execution, no evidence being offered to the contrary. *Ibid*

7. A declaration in covenant by heir-at-law, entitled to the reversion in fee against surviving lessee, stated a demise on the 27th of October 1792, to hold for three lives and the survivor of them, yielding and paying a yearly rent, and set out a covenant to pay the rent by the lessees during the term demised. It then averred that the lessees, by virtue of the demise, entered into and became seised of the said premises for the said term; that during the subsistence of said term one of the lessees died, and the other survived him; that the lessor also died, whereupon the reversion descended to the plaintiff as his son and heir; that one of the lives was still in being, and that during the continuance of the term, and whilst plaintiff was so seised of said reversion, to wit, on, &c., a large sum of money was due and owing of rent, &c. The deed being set out on oyer, purported to be executed on the 27th of October 1792, and demised the lands to the lessees, their heirs and assigns, from the 1st day of November next, for and during the three lives therein named. *Held*, on general demurrer, that the declaration was sufficient, and that it appearing from the declaration that the lessees became possessed under the lease of 1792, and no change of possession being averred, the inference is that the lessee still has possession of the premises, and that he was bound by the covenant to pay the rent. Q. B. *Knox v. Gildea* 474

8. *Semble*.—The statute 8 & 9 Vic. c. 106, has no retrospective operation. *Ibid*

9. A lease made by a Bishop, Dean or other dignitary, under the enabling and disabling statutes, requires no confirmation. Q. B. *Lessee Collins v. Knox* 492

10. The statute 10 W. 3, c. 6, s. 7, disabling Rectors, Vicars, Curates, Incumbents or other ecclesiastical persons whatsoever from making alienations, leases, &c., of glebes for more than one year, does not apply to Bishops, Deans, or other dignitaries. *Ibid*

## LIBEL.

See CRIMINAL INFORMATION.

## LICENSE.

See PLEADING, 37.

## LIMITATIONS, STATUTE OF.

1. *Held*, that an unaccepted proposal for a lease made by one C. F. (whose personal representative the defendant was) to the parties from whom the lessors of the plaintiff derived, such proposal having been signed by a third party for and in the presence of C. F., who was from illness unable to write, was evidence of an acknowledgment of title within the statute 3 & 4 W. 4, c. 27, s. 14. L. E. *Lessee of the Corporation of Dublin v. Judge* 8
2. To a declaration of debt on a bond, bearing date in 1806, the defendant pleaded the usual plea of *solvit post diem*; and at the trial, the plaintiff having failed to give evidence that any suit had been commenced or prosecuted for the recovery of the said debt, or any payment of principal or interest, or other satisfaction made on account of said bond, within twenty years before the commencement of the suit, *Held*, that the Judge ought not to have left the question of payment to the jury, but to have directed a verdict for the defendant. (*Dissentientibus* CRAMPTON, J., and PENNEFATHER, B.) Ex. Ch. *Executors of Kemmis v. Macklin* 372
3. To a *scire facias* defendant pleaded that a present right to receive the

money secured by the judgment accrued to the conusee more than twenty years before the suing out the writ; the plaintiff replied that the judgment was obtained on a *post obit* bond, traversing that a present right to recover the money secured by the judgment accrued more than twenty years before the suing out the writ; on this, issue in fact was taken. *Held*, that the production of a bond, agreeing in all respects with that on which the judgment had been entered, was *prima facie* evidence that it was the same bond as that on which the judgment had been entered.

Q. B. *Gilman v. Chute* 442

4. *Held also*, that the condition of the bond being given in evidence, it did not contradict the record, and was properly admissible to show that the bar created by the Statute of Limitations did not arise. *Ibid*

5. *Held also*, that the defendant having taken issue on the fact, could not aver that the record precluded enquiry.

*Ibid*

6. After the dissolution of a partnership, an account by a member of the partnership, authorised to wind up the affairs of the partnership and signed by him in the name of the firm, furnished to a creditor of the partnership, and admitting their liability to an extent therein stated; *Held*, not sufficient evidence of a new contract, so as to remove the bar created by the Statute of Limitations (9 G. 4, c. 14), and make another member of the partnership liable on foot of it. Q. B. *Bristow v. Miller* 461

7. *Held also*, that this account was at most but an acknowledgment of a debt, and not being signed by the defendant, was not sufficient evidence of a new contract within the meaning of the statute. *Ibid*

#### LUNATIC.

Where the defendant being confined in a private Lunatic Asylum, the process-server gave copies of the writ and

#### MANDAMUS.

notice at foot, and showed the original to the proprietor of the asylum (who refused to let him see the defendant) and to the defendant's brother, who was managing defendant's business in the house of the latter, the Court ordered that service of the writ of *capias* and of the order upon the defendant's brother, who was conducting the defendant's business on his behalf, and on the keeper of the Lunatic Asylum, be deemed good service of the defendant; serving upon the brother and keeper the particulars of the plaintiff's demand, and transmitting second copies of the process, order, and said demand to the keeper of the Lunatic Asylum, to be by him transmitted to the person who pays for the maintenance of the defendant. L. E. *Vance v. O'Connor* 60

#### MAGISTRATES.

The plaintiff was not, by having served notice of action upon four Justices, thereby precluded from declaring against two only. L. E. *Smith v. Mahon and another* 1

#### MANDAMUS.

*See* LANDS CLAUSES CONSOLIDATION ACT, 1, 3.

1. Where a Railway Company had obtained an Act of Parliament for the formation of a line of Railway, the compulsory powers in which were to be exercised within three years from its passing, and the line to be formed according to the course delineated in the plans, and where they afterwards obtained an Extension Act containing no clauses dispensing with the Company's obligation to form the line: *Held*, that a mandamus to the Company, commanding them to set out and purchase all lands necessary to make and complete a portion of their Railway, and to take all necessary proceedings so as to have all such land purchased, would not be granted on the application of a private individual, through whose lands a por-

## MANDAMUS.

tion of the Railway was to run; such applicant not appearing to represent the public in any capacity, nor resting his application on other than private grounds. *Q. B. Murphy v. The Great Southern and Western Railway Company* 219

2. The Court will not grant a mandamus to the Master of this Court commanding him to review his taxation of costs under the 8 Vic. c. 18. *In re Scully v. The Great Southern and Western Railway Company* 292

## MANOR COURT.

In a Manor Court of limited jurisdiction, a summons is the proper mode of proceeding to compel an appearance; and issuing an attachment is illegal and contrary to the policy of the Manor Court code. *Q. B. Costelloe v. Hooks and another* 294

## MARKET.

The occupier of a stall in the market of the city of Cork, for which he pays a weekly rent to the Corporation of Cork, who are the owners in fee of the soil, and who preserve a general control over the market, is liable to be rated to grand jury cess; he occupying it by the sale of meat during the day, leaving in it at night a desk under lock and key, and other property; and the circumstance of the servants of the Corporation shutting the outer gates in the evening, so that none but the servants of the Corporation can remain therein during the night, does not affect the occupier's liability. *Q. B. Waugh v. The Treasurer of Cork* 451

## MASTER.

*See MANDAMUS, 2.*

## MEMBER OF PARLIAMENT.

*See ESTREAT OF ISSUES.*

## MONEY HAD AND RECEIVED.

Where a party signed the subscribers' agreement and the parliamentary con-

## NOTICE, &c.

25

tract, for a projected railway, which agreement appointed a managing committee, and gave power to the directors to declare shares forfeited if the deposits were not paid, to supply vacancies in their body, the majority to bind the residue, and empowered them to carry out the undertaking, to make contracts and agreements, to apply for an Act of Parliament, to relinquish and wind up, if necessary, the undertaking, and apply the moneys deposited in payment of the expenses to be incurred, as they should think fit, and to invest the deposits and apply them for the undertaking; and where it appeared that some expenditure was incurred before the Committee of the House of Lords, but no evidence was given of the winding up of the affairs, or of any other expenditure, the bill for this railway having been thrown out by the House of Commons:—*Held*, that a shareholder who had paid the required deposit on his shares, could not recover it from one of the provisional committee in an action for money had and received. *Q. B. Daly v. Rooney* 487

## MOTION.

*See NOTICE OF MOTION.*

## NON PROS.

*See SETTING ASIDE PROCEEDINGS, 3.*

## NOTICE OF ACTION.

A plaintiff was not, by reason of having served notice of action on four justices, thereby precluded from declaring against two only. *L. E. Smith v. Mahon and another* 1

## NOTICE OF MOTION.

1. A notice of motion signed by an attorney, the date of whose certificate is subsequent to the date of the notice, is irregular. *L. E. Anonymous* 57
2. In order to enable the Sheriff to move for an interpleader order under statute 9 & 10 Vic. c. 64, notice of the

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intended motion must be given, as well to the execution creditor, as to all the adverse claimants of the goods seized under the *fi. fa.* by the Sheriff. *C. P. Alexander v. Connell* 325

## NOTICE OF RENT DUE.

1. The following is a sufficient notice of the amount of rent claimed, within the meaning of 9 & 10 *Vic. c. 111*, "The lessor of the plaintiff claims £374, being for two years' rent up to 1st of May 1847, and if the amount thereof be paid to the lessor with the plaintiff or his attorney, together with the costs, before the 22nd of May 1847, being the first day of the ensuing Term, further proceedings will be stayed." *Q. B. Lessee Lord Ash-town v. White* 400
2. The notice to be endorsed on a declaration in ejectment for non-payment of rent, in pursuance of 9 & 10 *Vic. c. 111*, does not require to be in the precise form prescribed by that statute. *Q. B. Lessee Marquis of Thomond v. Green* 405

## NOTICE OF TRIAL.

1. Where the last day for serving a notice of trial is also the last day for pleading, a notice served on that day in anticipation of a plea is good, although the defendant does not plead until the following morning, if he then files an issuable plea. *L. E. Lowry v. Robinson* 57
2. Where proceedings have been stayed until the costs of a former notice of trial are paid, the defendant, though called on, neglects to tax the costs, the plaintiff will be allowed to serve a fresh notice of trial, upon an undertaking to pay the costs of the former notice when taxed. *L. E. O'Brien v. Chadwick* 33
3. In an action against several defendants, of whom some had pleaded on the 9th of June, being the last day for pleading, and of whom others had not pleaded until the morning of the 10th,

## OUTLAWRY.

and upon all of whom notice of trial had been served upon the evening of the 9th, a fresh notice of trial, served upon the 10th on those defendants who had filed their pleas at an earlier hour upon that day, was, upon motion, ordered to be deemed a sufficient notice of trial to them, although the 9th, according to the usual practice, was the last day for serving notice of trial. *C. P. Farrell v. Fagan* 76

4. The costs of the above motion were ordered to be costs in the cause. *Ibid*

## OFFICER.

*See* APPOINTMENT.

## ORDER.

1. Form of order upon the rival claimants in an interpleader motion to appear before the Court, where they have not appeared upon a special motion by the Sheriff for an order of interpleader. *C. P. Alexander v. Connell* 325
2. Form of order directing an issue between the adverse claimants in an interpleader motion. *C. P. Alexander v. Handy* 328

## OUTLAWRY.

1. A declaration in debt commenced by stating that the defendant was attached by writ of privilege issuing out of this Court to answer the plaintiff, an attorney. Plea, that the plaintiff heretofore, "by an original writ," implied the defendant in this Court in assumpsit, and that on his non-appearance he was put in exigent, and subsequently "outlawed in due form of law," *prout patet, &c.*, and afterwards that certain proceedings according to law and the statute were had, by virtue of which the outlawry was duly reversed according to law; and that "afterwards, to wit, on, &c., an appearance on behalf of the said defendant in said outlawry by E. C., one of the attorneys, &c., was then and there and in the said Court enter-

ed in due form of law on behalf of the said defendant in said outlawry, at the suit of the said plaintiff in said outlawry;" and that "afterwards and after such reversal as aforesaid, and after such appearance as aforesaid, to wit, on, &c., the said plaintiff in said outlawry impleaded the said defendant in said outlawry" in this Court, and afterwards filed a declaration in debt against him, "which said impleading and declaration are the impleading and declaration in the present action;" and that the present suit is for a different cause of action from the cause of action on which the outlawry was grounded; "as by the records and proceedings thereon in this Court more fully appear:" all which impleadings, declarations and proceedings are *contra formam statuti* (6 *Anne*, c. 15, s. 4). *Held*, on special demurrer, that this plea was ill, forasmuch as it did not show any connection between the reversal of the outlawry and the entry of the appearance. C. P. *Pilkington v. Warner* 572

2. Whether the defendant should have cravedoyer of the original writ upon which the outlawry was founded—*Quære?* *Ibid*

3. Whether the reversal of the outlawry should have been pleaded *prout patet*, &c.—*Quære?* *Ibid*

4. The demurrer complained that the reversal of the outlawry was not verified by the record. *Held*, that in consequence of the general reference to the record at the end of the plea, the demurrer was not sufficiently pointed, but should have assigned as special cause that there was not a separate and distinct reference to the record in verification of the reversal of outlawry. *Ibid*

5. Whether the statute 11 *Jac.* 1. c. 8, s. 2 (*Ir.*), which requires a defendant, who seeks to reverse his outlawry, to put in special bail to appear and answer in a new action at suit of the same plaintiff, and to satisfy the con-

demnation money; and the statute 6 *Anne*, c. 15, s. 4, which requires that the cause of action in the new suit should be identical with that in the outlawry, and allows the defendant to plead their difference in bar, are repealed, or whether either of them is repealed by the statute 3 & 4 *Vic.* c. 105, s. 9—*Quære?* *Ibid*

6. Whether the apparent contradiction in the plea in stating the outlawry to have been obtained according to law, and afterwards to have been reversed according to law, laid it open to a special demurrer—*Quære?* *Ibid*

7. An application (before argument of the demurrer) to set aside the above plea summarily, was refused. *Ibid*

OYER.

*See* PLEADING, 38, 39.

Where a plaintiff unnecessarily makes profert of an indenture, and the defendant cravesoyer, the Court will not on motion set the rule foroyer aside, but will allow the declaration to be amended on payment of costs. Q. B. *Harvey v. Doherty* 460

PARLIAMENT.

*See* PRIVILEGE OF PARLIAMENT.

PARTICULARS.

*See* BILL OF PARTICULARS.

PARTNERS.

*See* PARTNERSHIP.

PARTNERSHIP.

*See* ACCOUNT STATED.

ATTORNEY, 1.

This Court will not substitute service on a partner resident within the jurisdiction for his co-partner out of the jurisdiction, though the debt be sworn to be a co-partnership one. Q. B. *McCann v. Thomson* 201

PATENT.

A patent of *Jac.* 1 gave to the patentee, his heirs and assigns for ever, "All

that the late dissolved monastery, &c., and also a marcett to be holden at the town of Newrie aforesaid, together with all tolls, &c., and also the assize of bread, ale and wine, and also one courte to be holden at the said town of Newrie, and in or within the precincts and liberties, &c., to be holden before the seneschal or seneschals of the patentee, his heirs, &c., together with power in the same Court to hold pleas of all and singular actions and trespasses, &c., not exceeding the value of 100 marks Irish; and also all and singular fines and amerciaments, &c., and knights' fees, wards, marriages, escheats, relieves, heriots, fines, courtes leets, and views of frankpledge, and courtes baron belonging or appertaining, with the fines, amerciaments and profits thereof, wayffs, estraies, goods and chattels of felons, and of such as fly for felony, of felons of themselves, outlaws, and of condemned persons, and such as are put in exigent, &c., saving always the right, title, estate, claim and demand of all our loving subjects, of, in, or to the premises," &c. The patent granted a power to hold a court baron, and to appoint a seneschal, and "some such fit person as he or they shall think fit to be the bailiffe of the said manor," &c., "and that every of the said bailiffes, for and during such time as he or they shall be bailiffe or bailiffes as aforesaid, shall and may have returne and execution of all manner of writts, executions, precepts, warrants, summons, attachments and mandates of us, our heirs and successors, &c., so as no sheriff, bailiffe, or other minister of us, our heirs, &c., may enter into the said manor, &c., to execute, prosecute, or serve any such like writts, precepts, warrants, summons, attachments, &c., which ought to be executed within the aforesaid manor," &c. *Held*, that the right of appointing a coroner did not thereby pass to the patentee. Q. B. *Boyd v. Magee*

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## PAYMENT.

*See* LIMITATIONS, STATUTE OF, 2.

## PLEADING.

## PAYMENT INTO COURT.

A defendant cannot demur to a declaration upon a single cause of action, after having paid money into Court subsequently to the filing of it. L. E. *Hynes v. Shannons* 25

## PENAL RENT.

*See* LEASE, 4.

## PENALTY.

In an action brought to recover penalties for receiving usurious interest, the defendant having obtained judgment as in case of a nonsuit, is not entitled to costs. Q. B. *Sample v. Gray* 508

## PLEA.

*See* PLEADING.

## PLEA IN ABATEMENT.

*See* PLEADING, 50.

To a declaration in assumpsit for work and labour, the defendant pleaded in abatement that at the time of the making of the promises he and certain other persons (naming them) were Commissioners for the time being of the town of A., appointed by virtue of 9 G. 4, c. 82, and were acting in execution of the Municipal Act, and that the promises were made jointly by the defendant and the said other persons; that afterwards their term of office expired, and other persons (naming them) succeeded to such office, and now are the acting Commissioners and resident within the jurisdiction. *Held*, a bad plea in abatement. Q. B. *Read v. Hatch* 262

## PLEA OF CONFESSION.

*See* SETTING ASIDE PROCEEDINGS, 7.

## PLEADING.

*See* INDICTMENT.

LIMITATIONS, STATUTE OF, 3.  
MONEY HAD AND RECEIVED.

## I. Generally.

1. In *quare impedit*, at the suit of a collateral relative of the first purchaser,

the former must show how he is *consanguineus et hæres* to the latter; but in doing so, it is not necessary for him to account at each step for all the lineal descendants respectively (other than those upon whose seisin he relies) of the persons through whom he traces title to himself. C. P. *Regina v. The Bishop of Cork* 114

2. It is irregular to sue in the names of two public officers of a Banking Company; but the Court will, even after appearance, amend the writ by striking out the name of one of the public officers. Q. B. *Grimshaw v. Bowden* 399

## II. Declaration.

3. Assumpsit by an executor, for use and occupation in the lifetime of his testator, and upon an account stated between the defendant and the executor. Promise to the executor to pay to him the said several moneys on request; Breach, "yet the defendant hath disregarded his promise, and hath not paid any of the said moneys, or any part thereof." Special demurrer—first, because it was not alleged that the sum claimed was due to the testator in his lifetime; secondly, because the breach did not distinctly negative any payment to the testator. *Held*, that the declaration was good. C. P. *Executor of Purden v. Leavy* 63

4. The plaintiff in the first count of the declaration stated, that being tenant from year to year under Sir R. B. St. G. of certain premises, comprising a dwelling-house, offices and land, he owed his landlord a certain sum for rent; that the defendant R. St. G., who was the agent of Sir R. B. St. G., had obtained a judgment in an action of assumpsit for a sum which included the sum due to Sir R. B. St. G. for rent; that having been arrested under a *ca. sa.* on foot of this judgment, the plaintiff delivered and gave up to the defendant, as such agent, the possession of the said demised lands and

premises, with their appurtenances, and divers crops and valuables, in full satisfaction and discharge of the damages, costs and charges so adjudged to the defendant, together with poundage and all lawful expenses, being the whole amount lawfully due or demandable of and from the plaintiff by the defendant under the writ; and that the defendant then and there accepted and received the same in full discharge and satisfaction of the said damages, &c., and then and there agreed to instruct the Sheriff that the same was satisfied, and to give authority to the Sheriff to discharge the plaintiff, but did not, whereby the plaintiff was further detained in custody. The second count was the same, except that it omitted the averment of the delivery of possession of the lands and premises. The third and fourth counts were the same in other respects as the first and second, but omitted the agreement to discharge, and averred that upon the delivery in satisfaction the plaintiff was thereupon entitled to be discharged, but was not. The fifth count was the same as the first, but omitted the averment of tenancy, or that the amount recovered by the judgment included the sum due to Sir R. B. St. G. Plea, the general issue. Verdict for the plaintiff. *Held*, that the judgment having been in fact satisfied, there was a duty cast upon the defendant to discharge the plaintiff from custody, for the non-performance of which the action well lay. L. E. *Power v. St. George* 79

5. Where in an action of debt for rent by the assignee of a reversion of a lease for lives renewable for ever, against the assignee of an underlessee, the declaration averred that the reversioner was seised in his demesne as of freehold to him and his heirs, for the term of two lives, by virtue of a lease, originally for three lives, "and which said lease has been kept on foot and continued, and is still subsisting;" and that being so seised,

the reversioner made the under-lease. *Held*, that such averment was sufficient, and that it was unnecessary to set out any of the renewals of the original lease, and that under the 5 G. 2, c. 4, such averment was sustained in evidence by the renewals, though the renewals showed that all the lives in the original lease had long dropped. Q. B. *Moore v. McGuire* 272

6. The declaration contained the usual averment, that all the under-lessee's interest came to the defendant by assignment, and the defendant by plea traversed the assignment; and the original lease contained a clause, by which the head landlord reserved to himself a power to re-assume into his possession a portion of the demised premises, making a proportional abatement of rent; and the under-lease contained a proviso, that the under-lessee and his assigns should be bound by such clause; and the evidence to charge the defendant with the assignment was, that he had been in possession of all the premises in the under-lease, except the part which the landlord had taken possession of pursuant to the power, and had paid the rent reserved by the under-lease. *Held*, that the issue was sufficiently sustained on the part of the plaintiff by such evidence, and that there was no variance. *Ibid*

7. The under-lease contained a clause subsequent to the reservation clause, in which the reversioner agreed to accept a reduced rent so long as the lessees, &c., should not build. The declaration claimed the larger rent, though it appeared on the evidence that the lessees, &c., had not built. *Held*, that it was unnecessary to refer in the declaration to this agreement, and that there was no variance. *Ibid*

8. By indenture the defendant covenanted that he would not, without plaintiff's consent in writing, do or consent to any act whereby any or either, or any part or parts of the

appointment, uses or trust in a certain deed should be in any way invalidated or prevented from taking effect; and that if his (the defendant's) father should die without having executed a certain deed of the 21st of July, that the defendant on request would do all such lawful and reasonable acts, whether by obtaining an Act of Parliament, or otherwise, as should be advised by Counsel to be necessary or expedient for corroborating an indenture of equal date therewith; and further, that in the same event, viz., the death of defendant's father, without executing said deed of the 21st of July, if defendant should refuse or neglect in six months after that event, and after request, to do such lawful acts as Counsel should advise to be necessary for corroborating, as far as the defendant lawfully might, the deed of appointment, that he would, at the expiration of the six months, pay the plaintiff the full value of the interest intended to be vested in him by the deed of appointment and trust, with all damages caused by such neglect, and all sums expended on the faith of the said deed of appointment. In a declaration on this covenant the breach assigned on the first clause of this covenant was, that the defendant, after his father's death, presented a petition to the House of Lords, and obtained an Act of Parliament, whereby the premises were vested in certain trustees in fee, in trust to sell them, or a competent part of them, to pay debts and incumbrances. *Held*, that the procuring said Act of Parliament was a breach of the first covenant. Q. B. *Crommelin v. The Marquis of Donegal* 423

9. The declaration stated, that plaintiff was advised by Counsel that it was necessary and expedient to obtain an Act of Parliament to confirm the deed; that the defendant had notice thereof, and was requested to procure it so far as he lawfully might. *Held*, that this breach was well assigned, and that the two clauses constituted

distinct averments. But even if it were but a single averment, the declaration stated a substantial breach of it. Q. B. *Crommelin v. The Marquis of Donegal* 423

10. A declaration in covenant by heir-at-law, entitled to the reversion in fee, against surviving lessee, stated a demise on the 27th of October 1792, to hold for three lives and the survivor of them, yielding and paying a yearly rent, and set out a covenant to pay the rent by the lessees during the term demised. It then averred that the lessees, by virtue of the demise, entered into and became seised of the said premises for the said term; that during the subsistence of said term one of the lessees died, and the other survived him; that the lessor also died, whereupon the reversion descended to the plaintiff as his son and heir; that one of the lives was still in being, and that during the continuance of the term, and whilst plaintiff was so seised of said reversion, to wit, on, &c., a large sum of money was due and owing of rent, &c. The deed being set out on oyer, purported to be executed on the 27th of October 1792, and demised the lands to the lessees, their heirs and assigns, from the 1st day of November next, for and during the three lives therein named. *Held*, on general demurrer, that the declaration was sufficient, and that it appearing from the declaration that the lessees became possessed under the lease of 1792, and no change of possession being averred, the inference is that the lessee still has possession of the premises, and that he was bound by the covenant to pay the rent. Q. B. *Knox v. Gildea* 474

11. By the 5 G. 4, c. 159, s. 1, the Hibernian Joint Stock Company are enabled to sue in the name of the Governor or Secretary for the time being of the Company; and by the 2nd and 3rd sections a memorial of the names of the persons forming the Company is to be enrolled in the

manner prescribed by the Act, prior to which enrolment they are not at liberty to sue. A declaration stated the plaintiff to be the Secretary of the Company, but did not aver that any such registry as required by the Act had been made. *Held*, on demurrer, that the omission of this averment was immaterial. Q. B. *Fottrill v. Willans* 482

12. To an action for poor's rate, brought under the statute 6 & 7 Vic. c. 92, in one of the Superior Courts, against an immediate lessor, the consent of the Commissioners, who, at the institution of the action, are entrusted with the chief administration of the laws for the relief of the poor in Ireland, must be averred in the declaration, such consent being a condition precedent to the bringing of the action. It is not necessary that the consent should be given under the seal of the Board. C. P. *The Guardians of Ballinrobe Union v. Browne* 546
13. The declaration (filed in June 1848) in such an action, after referring to the statutes 1 & 2 Vic. c. 56, and 6 & 7 Vic. c. 92, stated that the Guardians sued "by and with the consent of the Poor-law Commissioners," but made no reference to the statute 10 & 11 Vic. c. 90 (passed the 22nd of July 1847), which recites that their commission would expire at the end of the Session of Parliament next after the 31st of July 1847, and which authorises the appointment of certain persons as "Commissioners for administering the Laws for relief of the Poor in Ireland." *Held*, on special demurrer, that the consent was sufficiently pleaded, there being nothing before the Court to show when the authority of the former Commissioners had terminated, or that of the latter commenced. *Ibid*
14. In an action brought by the Guardians of a Union against an immediate lessor, one count proceeded

for "rates and arrears of rate," and contained language tending to show that by "rates" were meant sums due in respect of the most recently imposed rate, and by "arrears of rate" were meant sums due in respect of by-gone rates. The plaintiffs having shown a right to sums due in respect of the most recently imposed rate only, *Held*, on special demurrer, that the count was bad, and that the Court could not construe "rates" to be synonymous with "arrears of rate," the plaintiffs by their pleading having affixed to those expressions distinct meanings. C. P. *The Guardians of Ballinrobe Union v. Browne* 546

15. The argument on one point of a demurrer having terminated, the Court refused, with respect to that point at least, to listen to an objection then first made, that the demurrer was too large. But that objection was afterwards allowed to prevail with respect to the subsequently argued points of demurrer. *Ibid*

16. A count in an action for poor's rate, due in four Electoral Divisions of the Union, averred, as to two of those Electoral Divisions, publication of notice of the rate having been made, but omitted to aver such publication as to the two other Electoral Divisions; *Semble*, that the count was bad in regard to the two latter Electoral Divisions. *Held*, however, that the cause of action being divisible, the demurrer should have been confined to the bad part of the count; and that having been aimed at the whole count, the demurrer must be overruled as too large. *Ibid*

17. A demurrer to a declaration, containing several counts, commenced thus:—"And the defendant by, &c., comes, &c., and saith that the said declaration, and the matters therein contained in manner and form as the same are above stated, are not sufficient in law," and then proceeded to assign causes of demurrer to each

count separately; *Held*, that as some of the counts (*semble*) were good, the demurrer was too large, and must be overruled accordingly. *Ibid*

18. In an action for poor's rate, brought against an immediate lessor by the Guardians of the Union, the plaintiffs may combine in one declaration, or in one count of it, claims for rate due from the defendant in respect of several Electoral Divisions of that Union. *Semble* in this case, and so *Held* in *Castlebar Union v. Browne* (*infra*, in notis.) *Ibid*

19. In a count for poor's rate, *Semble* in this case, and *Held* in *Castlebar Union v. Browne* (*infra*, in notis), that the parties who allowed the rate, and their authority to do so (under 6 & 7 Vic. c. 92, s. 10), were sufficiently set forth by an averment—"that one A. B., to wit, a paid officer, who was then and there the Chairman of the day of the said Board, and one C. D., and one E. F., to wit, two paid officers, to wit, two Guardians, then present at said Board," &c., allowed the rate. *Ibid*

20. In an action against an immediate lessor for poor's rate, the plaintiffs were stated to be "the Guardians of the Poor of Ballinrobe Union." In a similar action the plaintiffs were stated to be "the Guardians of the Poor of Castlebar Union." *Semble* in the former case, and *Held* in the latter, that the description of the plaintiffs' title to sue was sufficient. *Ibid*

21. In action against an immediate lessor for poor's rate, it is not necessary to state the respective numbers (as appearing in the rate-book) of the several rateable hereditaments in describing them, generality of statement in this respect being admissible, as the defendant may obtain all necessary information on the subject from the rate-book.—*Semble* in this case, and *Held* so in *Castlebar Union v. Browne* (*infra* in notis). *Ibid*

22. A count, in an action against an

immediate lessor for poor's rate, stated that the defendant became liable to pay the amount of the said rate so remaining due and unpaid as aforesaid by the defendant in respect of the said hereditaments, situate, &c., for which respectively he, as such immediate lessor, was by virtue of a certain Act of Parliament "in due form of law rated as aforesaid." Whether this referential averment, in the absence of any other allegation, that the defendant was rated, is sufficient, *Quære?* A special demurrer to this count, assigning as cause of demurrer that the count did not state "how or in what manner the rate was imposed, or how the defendant is liable to the said rate," was held not to point out with requisite precision the insufficiency of the above referential averment. C. P. *The Guardians of Ballinrobe Union v. Browne* 546

23. In *quare impedit*, at the suit of a collateral relative of the first purchaser, the former must show how he is *consanguineus et hæres* to the latter, but, in doing so, it is not necessary for him to account at each step for all the lineal descendants respectively (other than those upon whose seisin he relies) of the persons through whom he traces title to himself. C. P. *Regina v. The Bishop of Cork* 114

24. A count in *quare impedit*, at the suit of the Crown, commenced by alleging that Mary Fitzgerald and her husband were seised as of fee and of right to them and the heirs of Mary, in her right, of an advowson in gross, and then traced its descent through her eldest son, who presented, and died without issue, then through her second son, who died without issue, and then through her third son, who died in 1837 without issue, leaving W. E. Fitzgerald his heir-at-law *ex parte maternâ*, as cousin. W. E. Fitzgerald being a Roman Catholic, the Crown now claimed in his right. The count traced his descent through several intermediate steps, from Mar-

garet Barry, the only daughter of James Barry, by Mary Cunningham his wife, grand-daughter of Giraldus Barry by her mother, the daughter of Giraldus Barry; and it stated that the daughter of Giraldus Barry died without other issue than Mary Cunningham and her issue, and that said James Barry and Mary his wife died without other issue of them, or either of them, than the issue of Margaret Barry their daughter. It next showed the descent of James Barry, by stating that he was the eldest son of James Fitz Robert Barry, who was second brother of Giraldus Barry, and the son of one Robert Barry. It then showed the descent of Mary Fitzgerald (with whose seisin and that of her husband it had commenced) from Giraldus Barry, and alleged that at the occurrence of the vacancy "there was no other issue or lineal descendant of Giraldus Barry save and except the issue of James Barry and Mary his wife." To this count the defendants demurred, assigning as cause—first, that there was no direct averment of the exhaustion of the issue of Mary Fitzgerald; secondly, that the allegation, that at the occurrence of the vacancy "there was no other issue or lineal descendant of Giraldus Barry, save and except the issue of James Barry and Mary his wife," was argumentative and tendered an immaterial issue; and thirdly, that the seisin alleged in John and Mary Fitzgerald was improperly laid, because it did not show the commencement of the estate to John and Mary and the heirs of Mary. The Court overruled all the grounds of demurrer. *Ibid*

### III. Subsequent Pleadings.

25. A count in *quare impedit* alleged a presentation to the vicarage of D, and afterwards a presentation of the same clerk by the same patron to the rectory of D, and stated a subsequent consolidation of the vicarage and rectory, and from that point proceeded for the union.—*Held*, that the defend-

ants may by one plea specially traverse the presentation to the vicarage, and by another specially traverse the presentation to the rectory. C. P. *Regina v. The Bishop of Cork* 114

26. A declaration in *quare impedit*, in the deduction of title, alleged "that A was the *only* daughter of B." A special traverse "without this, that A was the *only* daughter of B," is not too large, and does not tender an immaterial issue. *Ibid*

27. Where a count in *quare impedit* alleged a seisin in fee of an advowson in one Sovereign, and a presentation by him, and that he died so seised, whereupon his successor became seised;—*Held*, that a plea which did not show any termination of the seisin of the former Sovereign, and which specially traversed the seisin of his successor, was ill, inasmuch as it traversed a conclusion of law. *Ibid*

28. In *quare impedit*, the rule against counterpleading the title of the plaintiff, where the defendant does not aver any title in himself, is not limited to the pleas of the clerk and ordinary, but applies to the pleas of any defendant who does not allege title in himself; and this is so, although in fact his clerk be in possession. *Ibid*

29. In *quare impedit*, pleas by way of special traverse by either the alleged patron or his clerk, albeit that the latter has been admitted, instituted, and inducted, must *pro forma*, as inducement, show a title in the alleged patron, inconsistent with that of the plaintiff. A general and vague averment of seisin in the alleged patron and his ancestors will not be sufficient. The principal object of this rule is the restriction of the defendants to the production of such evidence only under those pleas as is consistent with their title, as specially set forth in the inducements. *Ibid*

30. To a declaration in assumpsit for work and labour, the defendant pleaded in abatement that at the time of the

making of the promises he and certain other persons (naming them) were Commissioners for the time being of the town of A., appointed by virtue of 9 G. 4, c. 82, and were acting in execution of the Municipal Act, and that the promises were made jointly by the defendant and the said other persons; that afterwards their term of office expired, and other persons (naming them) succeeded to such office, and now are the acting Commissioners and resident within the jurisdiction. *Held*, a bad plea in abatement. Q. B. *Read v. Hatch* 262

31. To a declaration for calls by a Railway Company, the defendant pleaded that he was not before or at the time of the commencement of the action, nor is, a holder of the shares in the declaration mentioned, or any of them, in manner and form as is in the declaration alleged; and further pleaded that the Company, with others, did fraudulently enter into a contract for a purchase of the Royal Canal, upon conditions inconsistent with the terms of their Act, and without any lawful authority; and that the calls were made for payment of that purchase and not for the purpose of the Railway. *Held*, on demurrer, that such special pleading was bad, the defence amounting to the general issue. Q. B. *The Midland Great Western Railway Company v. Bourke* 267

32. In a plea justifying trespass under process of an Inferior Court, it is not enough to state that the defendant levied his plaint for a cause of action arising within the jurisdiction of such Court; the plea should also show that the trespasses complained of were committed within the jurisdiction. Q. B. *Butler v. Bianconi* 286

33. Assumpsit by indorsee against acceptor of a bill of exchange for £74. 11s.—Plea, that defendant accepted a bill of exchange stamp in blank, upon agreement that A and B should draw upon the stamp a bill

for £65. 1s. 2d., but that, without the knowledge or assent of the defendant, A and B drew upon the stamp a bill for £74. 11s. and indorsed it to the plaintiffs, who had due notice of the matters aforesaid. Replication *de injuriâ suâ propriâ*. *Held*, upon special demurrer to the replication, that it was ill, forasmuch as the plea contained no admission of the contract declared upon. C. P. *Allingham v. Walker* 332

34. *Held also*, that a special demurrer to the plea would have been allowed, because it amounted to the general issue, and was an argumentative denial of the acceptance, but that as the defect was in form only, the plaintiffs could not fall back upon it.

*Ibid*

35. To a declaration by the plaintiff as indorsee of two bills of exchange, the defendant pleaded that he did lose a certain sum of money to A B, and the said A B did win of the defendant a certain sum of money, to wit, the sum of £500, by gaming and playing at a certain game called hazard, and that he accepted those two bills as security for the money so lost; and that the plaintiff when he became indorsee and holder and interested in those bills, knew that the same had been made on this illegal consideration. Replication protesting that the said bills were given for this illegal consideration, nevertheless that the bills before they became due were indorsed to the plaintiff for valuable consideration, and that when he first became and was the indorsee and interested in said bills, he did not know that same had been made for the illegal consideration alleged.—*Held*, on special demurrer, that the replication was sufficient.—(CRAMP-  
TON, J., *dissentiente*.) Q. B. *Batcock v. Cole* 306

36. *Scire facias* issued at the suit of A B, the assignee of a judgment, averring in the ordinary manner the execution, by the conusee, of the

deed of assignment, and according to the form of the statute, "as by the memorial and record thereof remaining in our said Court, &c., manifestly appears." Plea, *executio non*, because the conusee did not assign, transfer, or make over the said alleged judgment debt and damages in the *scire facias* mentioned to the said A B *modo et formâ*, &c., concluding with a prayer of judgment. *Held*, on special demurrer, that the plea was bad. C. P. *Assignee of Lynch v. Kennedy* 341

37. An indenture of lease contained a clause against alienation, unless with the consent, under hand and seal, of the landlord, and that the indenture should be void without such consent. To a declaration for non-payment of rent, founded on such indenture, the defendant pleaded that the lessee had assigned to him, without the required consent being given by the landlord. *Held*, that the plea was bad, as it did not allege the non-existence of a consent in all the modes specified in the Subletting Act, 2 W. 4, c. 17; and that it should have negatived every species of license which could validate the lease. Q. B. *Duke of Leinster v. Metcalf* 365

38. A declaration in debt commenced by stating that the defendant was attached by writ of privilege, issuing out of this Court, to answer the plaintiff, an attorney. Plea, that the plaintiff heretofore, "by an original writ," impleaded the defendant in this Court in assumpsit, and that on his non-appearance he was put in exigent, and subsequently "outlawed in due form of law," *prout patet*, &c., and afterwards that certain proceedings according to law and the statute were had, by virtue of which the outlawry was duly reversed according to law; and that "afterwards, to wit, on, &c., an appearance on behalf of the said defendant in said outlawry by E. C., one of the attorneys, &c., was then and there and in the said Court entered in due form of law on behalf

of the said defendant in said outlawry, at the suit of the said plaintiff in said outlawry;" and that "afterwards and after such reversal as aforesaid, and after such appearance as aforesaid, to wit, on &c., the said plaintiff in said outlawry impleaded the said defendant in said outlawry" in this Court, and afterwards filed a declaration in debt against him, "which said impleading and declaration are the impleading and declaration in the present action;" and that the present suit is for a different cause of action from the cause of action on which the outlawry was grounded; "as by the records and proceedings thereon in this Court more fully appear:" all which impleadings, declarations, and proceedings, are *contra formam statuti* (6 *Anne*, c. 15, s. 4). *Held*, on special demurrer, that this plea was ill, forasmuch as it did not show any connection between the reversal of the outlawry and the entry of the appearance. C. P. *Pilkington v. Warner* 572

39. Whether the defendant should have cravedoyer of the original writ, upon which the outlawry was founded—*Quære?* *Ibid.*

40. Whether the reversal of the outlawry should have been pleaded *prout patet*, &c.—*Quære?* *Ibid.*

41. The demurrer complained that the reversal of the outlawry was not verified by the record. *Held*, that in consequence of the general reference to the record at the end of the plea, the demurrer was not sufficiently pointed, but should have assigned as special cause that there was not a separate and distinct reference to the record, in verification of the reversal of outlawry. *Ibid.*

42. Whether the statute 11 *Jac.* 1, c. 8, s. 2 (*Ir.*), which requires a defendant, who seeks to reverse his outlawry, to put in special bail to appear and answer in a new action at suit of the same plaintiff, and to satisfy the condemnation money; and the statute

6 *Anne*, c. 15, s. 4, which requires that the cause of action in the new suit should be identical with that in the outlawry, and allows the defendant to plead their difference in bar, are repealed, or whether either of them is repealed by the statute 3 & 4 *Vic.* c. 105, s. 9—*Quære?* *Ibid.*

43. Whether the apparent contradiction in the plea in stating the outlawry to have been obtained according to law, and afterwards to have been reversed according to law, laid it open to a special demurrer—*Quære?* *Ibid.*

44. An application (before argument of the demurrer) to set aside the above plea summarily, was refused. *Ibid.*

#### IV. Practice.

45. A plaintiff was not, by having served notice of action upon four Justices, thereby precluded from declaring against two only. L. E. *Smith v. Mahon and another* 1

46. A defendant cannot demur to a declaration upon a single cause of action, after having paid money into Court subsequently to the filing of it. L. E. *Hynes v. Shannons* 25

47. Where a party pleads and demurs at the same time to the same count, the demurrer is overruled by the plea, and will be struck out. L. E. *Samuels v. Atkinson* 50

48. Where the last day for serving a notice of trial is also the last day for pleading, a notice served on that day in anticipation of a plea is good, although the defendant does not plead until the following morning, if he then files an issuable plea. L. E. *Lowry v. Robinson* 57

49. A rule to plead entered upon a day previous to the service of notice of the filing of the declaration is a mere nullity. C. P. *Martin v. Smyth* 67

50. Where a rule to plead had been entered under such circumstances, and a plea in abatement filed after the expiration of four days from service of

notice of the filing of the declaration, an application by the plaintiff to set aside the plea was refused with costs.

C. P. *Martin v. Smyth* 67

51. The officer of the Court has not power to receive a plea at any place except the office of the Court. *Ibid*

52. In an action against several defendants, of whom some had pleaded on the 9th of June, being the last day for pleading, and of whom others had not pleaded until the morning of the 10th, and upon all of whom notice of trial had been served upon the evening of the 9th, a fresh notice of trial, served upon the 10th on those defendants who had filed their pleas at an earlier hour upon that day, was upon motion, ordered to be deemed a sufficient notice of trial to them, although the 9th, according to the usual practice, was the last day for serving notice of trial. C. P. *Farrell v. Fagan* 76

## POOR-LAW.

1. The 1 & 2 Vic. c. 56, s. 59 (Poor-law Act), provides, that if any person shall desert his wife or child, so that they become relievable in a workhouse, every such offender shall, on conviction before a Justice of the Peace at Petty Sessions, in open Court, be committed to gaol, to be kept to hard labour for any term not exceeding three months; 10 & 11 Vic. c. 84, s. 1, repealed that clause, and provided that every person who should desert or wilfully neglect to maintain his wife or child, so that they became relievable in or out of a workhouse, should be committed to gaol and kept to hard labour for a term not exceeding three months. A committal, bearing date in 1848, and stating that B., on the 8th of August 1845, at Henry-street, within said district, did desert his wife and children, and that they became destitute, and were on the 29th of December last past admitted into the workhouse in said district, and were still relieved there. *Held*, a bad committal, there being nothing in it to show that the

destitution and the relief afforded were connected with the particular desertion in 1845; and the statute not having passed until 1847, the offence must have begun after the passing of that statute. Q. B. *In re Frederick Byrne* 538

2. To an action for poor's rate, brought under the statute 6 & 7 Vic. c. 92, in one of the Superior Courts, against an immediate lessor, the consent of the Commissioners, who, at the institution of the action, are entrusted with the chief administration of the laws for the relief of the poor in Ireland, must be averred in the declaration, such consent being a condition precedent to the bringing of the action. It is not necessary that the consent should be given under the seal of the Board. C. P. *The Guardians of Ballinrobe Union v. Browne* 546

3. The declaration (filed in June 1848) in such an action, after referring to the statutes 1 & 2 Vic. c. 56, and 6 & 7 Vic. c. 92, stated that the Guardians sued "by and with the consent of the Poor-law Commissioners," but made no reference to the statute 10 & 11 Vic. c. 90 (passed the 22nd of July 1847), which recites that their commission would expire at the end of the Session of Parliament next after the 31st of July 1847, and which authorises the appointment of certain persons as "Commissioners for administering the Laws for relief of the Poor in Ireland." *Held*, on special demurrer, that the consent was sufficiently pleaded, there being nothing before the Court to show when the authority of the former Commissioners had terminated, or that of the latter commenced. *Ibid*

4. In an action brought by the Guardians of a Union against an immediate lessor, one count proceeded for "rates and arrears of rate," and contained language tending to show that by "rates" were meant sums

due in respect of the most recently imposed rate, and by "arrears of rate" were meant sums due in respect of by-gone rates. The plaintiffs having shown a right to sums due in respect of the most recently imposed rate only, *Held*, on special demurrer, that the count was bad, and that the Court could not construe "rates" to be synonymous with "arrears of rate," the plaintiffs by their pleading having affixed to those expressions distinct meanings. C. P. *The Guardians of Ballinrobe Union v. Browne* 546

5. A count in an action for poor's rate, due in four Electoral Divisions of the Union, averred, as to two of those Electoral Divisions, publication of notice of the rate having been made, but omitted to aver such publication as to the two other Electoral Divisions; *Semble*, that the count was bad in regard to the two latter Electoral Divisions. *Held*, however, that the cause of action being divisible, the demurrer should have been confined to the bad part of the count; and that having been aimed at the whole count, the demurrer must be overruled as too large. *Ibid*
6. In an action for poor's rate, brought against an immediate lessor by the Guardians of the Union, the plaintiffs may combine in one declaration, or in one count of it, claims for rate due from the defendant in respect of several Electoral Divisions of that Union. *Semble* in this case, and so *Held* in *Castlebar Union v. Browne* (infra, in notis.) *Ibid*
7. In a count for poor's rate, *Semble* in this case, and *Held* in *Castlebar Union v. Browne* (infra, in notis), that the parties who allowed the rate, and their authority to do so (under 6 & 7 Vic. c. 92, s. 10), were sufficiently set forth by an averment—"that one A B, to wit, a paid officer, who was then and there the Chairman of the day of the said Board, and one C D, and one E F, to wit, two

paid officers, to wit, two Guardians, then present at said Board," &c., allowed the rate. *Ibid*

8. In an action against an immediate lessor for poor's rate, the plaintiffs were stated to be "the Guardians of the Poor of Ballinrobe Union." In a similar action the plaintiffs were stated to be "the Guardians of the Poor of Castlebar Union." *Semble* in the former case, and *Held* in the latter, that the description of the plaintiffs' title to sue was sufficient. *Ibid*
9. In an action against an immediate lessor for poor's rate, it is not necessary to state the respective numbers (as appearing in the rate-book) of the several rateable hereditaments in describing them, generality of statement in this respect being admissible, as the defendant may obtain all necessary information on the subject from the rate-book.—*Semble* in this case, and *Held* so in *Castlebar Union v. Browne* (infra in notis). *Ibid*
10. A count, in an action against an immediate lessor for poor's rate, stated that the defendant became liable to pay the amount of the said rate so remaining due and unpaid as aforesaid by the defendant in respect of the said hereditaments, situate, &c., for which respectively he as such immediate lessor was by virtue of a certain Act of Parliament "in due form of law rated as aforesaid. Whether this referential averment, in the absence of any other allegation, that the defendant was rated, is sufficient, *Quere?* A special demurrer to this count, assigning as cause of demurrer that the count did not state "how or in what manner the rate was imposed, or how the defendant is liable to the said rate," was held not to point out with requisite precision the insufficiency of the above referential averment. *Ibid*

#### POOR RATE.

See POOR LAW, 2, 3, 4, 5, 6, 7, 8, 9, 10.

## POSSESSION.

### POSSESSION.

1. In an ejectment on the title, brought to recover "the Dummilly estate," the will of the Bishop of Ferns, who was in possession of and residing at Dummilly-house in 1786, was given in evidence; and by that will he devised all the lands and hereditaments of which he was seised in the county of Armagh, to N. A. Cope and Sarah his wife, for their joint lives, and the survivor, with remainder to their first and other sons in tail male, with remainder to their issue female. The will also contained a power to tenants for life to create a charge not exceeding £4000. The lessor of the plaintiff was sole daughter of that marriage, and claimed under the second remainder in tail. *Held*, that evidence of the Bishop's possession of one denomination of the estate, viz., a lease of Lisshesfield, and payment and receipt of rent under that lease, was admissible as evidence of possession of the whole estate by the Bishop, coupled with evidence of the receipt of rents from 1795 to the period of the death of the last tenant for life, out of the whole lands which were known as the Dummilly estate. Q. B. *Lessee Garland v. Cope* 514
2. The power of charging was exercised in 1818 by the tenant for life; and in 1838 a younger son, not in possession, executed a deed assigning a sum of £1000, part of his portion of the £4000 charged on the estate. *Held*, that the deed of 1818 was admissible in evidence as being against the interest of the party making it; it is not merely a declaration by the tenant for life, but a substantive act done by the possessor of the estate. *Held*, that the deed of 1838 was admissible, on the same principle, as being executed by a person interested in the estate, both deeds showing that the Dummilly estate was enjoyed under the limitations in the will, and therefore evidence of seisin in fee of the Bishop of the whole. *Ibid*

## RAILWAY COMPANY. 39

### POST OBIT.

*See* LIMITATIONS, STATUTE OF, 3, 4, 5.

### PRIVILEGE.

Where in default of appearance to an action brought against a person having privilege of Parliament, full issues are returned by the Sheriff, the proper practice is to have the issues returned into this Court. Q. B. *Belfast and Ballymena Railway Company v. Ross, M.P.* 363

### PRIVITY OF ESTATE.

*See* PLEADING, 37.

### PROCESS.

*See* SERVICE, SUBSTITUTION OF. SETTING ASIDE PROCEEDINGS, 2.

A corporation cannot be sued by *ca. sa.*, and the Court will set aside all proceedings founded on such process. Q. B. *Kelly v. The Midland Great Western Railway Company* 305

### PROFERT.

*See* AMENDMENT, 5.

### PUBLIC OFFICER.

It is irregular to sue in the names of two public officers of a Banking Company; but the Court will, even after appearance, amend the writ by striking out the name of one of the public officers. Q. B. *Grimshaw and another v. Bowden* 399

### QUARE IMPEDIT.

*See* PLEADING, 23, 24, 25, 26, 27, 28, 29.

## RAILWAY COMPANY.

*See* BILL OF PARTICULARS, 1.

### DEPOSIT.

### PROCESS.

1. Where a Railway Company had obtained an Act of Parliament for the formation of a line of Railway, the compulsory powers in which were to be exercised within three years from

its passing, and the line to be formed according to the course delineated in the plans, and where they afterwards obtained an Extension Act containing no clauses dispensing with the Company's obligation to form the line: *Held*, that a mandamus to the Company commanding them to set out and purchase all lands necessary to make and complete a portion of their Railway, and to take all necessary proceedings so as to have all such land purchased, would not be granted on the application of a private individual through whose lands a portion of the Railway was to run; such applicant not appearing to represent the public in any capacity, nor resting his application on other than private grounds. Q. B. *Murphy v. The Great Southern and Western Railway Company* 219

2. To a declaration for calls by a Railway Company, the defendant pleaded that he was not before or at the time of the commencement of the action, nor is, a holder of the shares in the declaration mentioned, or any of them, in manner and form as is in the declaration alleged; and further pleaded that the Company, with others, did fraudulently enter into a contract for a purchase of the Royal Canal, upon conditions inconsistent with the terms of their Act, and without any lawful authority; and that the calls were made for payment of that purchase and not for the purpose of the Railway. *Held*, on demurrer, that such special pleading was bad, the defence amounting to the general issue. Q. B. *The Midland Great Western Railway Company v. Bourke* 297

#### RAILWAY CLAUSES CONSOLIDATION ACT.

*See* LANDS CLAUSES CONSOLIDATION ACT, 1.

#### RAILWAY SHARES.

*See* DEPOSIT.

#### RATE.

*See* POOR-RATE.

#### SALE.

##### RECOGNIZANCE.

*See* ERROR, 4.

##### RECORD.

*See* CRIMINAL INFORMATION, 2.

##### RECORDER'S COURT.

*See* BOROUGH COURT.

##### REGISTRY.

By the 5 G. 4, c. 159, s. 1, the Hibernian Joint Stock Company are enabled to sue in the name of the Governor or Secretary for the time being of the Company; and by the 2nd and 3rd sections a memorial of the names of the persons forming the Company is to be enrolled in the manner prescribed by the Act, prior to which enrolment they are not at liberty to sue. A declaration stated the plaintiff to be the Secretary of the Company, but did not aver that any such registry as required by the Act had been made. *Held*, on demurrer, that the omission of this averment was immaterial. Q.B. *Fottrill v. Willans* 482

##### RENT.

*See* LEASE, 4.

NOTICE OF RENT DUE.

##### REPLICATION.

*See* PLEADING.

##### RETAINER.

*See* ATTORNEY, 3.

##### RETURN.

*See* LANDS CLAUSES CONSOLIDATION ACT, 1.

SHERIFF'S RETURN.

##### REVIVAL.

*See* SCIRE FACIAS.

##### RULE TO PLEAD.

*See* PLEADING, 49.

#### SALE.

*See* EVIDENCE, 4.

1. A contract for "the cargo of the ship S." is not a contract for the specific

## SALE.

cargo of the S., and does not stand on the same footing as a contract for the sale of a specific chattel; such words imply a sale of the cargo, if it answer the description given by the purchaser. Q. B. *Malcomson v. Morton* 230

2. *Semble*.—If a party purchases an article, whether specific or not, the value of which is fluctuating and uncertain, on a stipulation that it is of a certain quality, he is at liberty to reject it if it does not agree with the description, and sue for the value which it would have borne if it answered the description. *Ibid*

3. On a contract founded on this note: "Sold Messrs. M., &c., per Mr. C. C., the cargo of the Science from Smyrna, say about 1250 quarters of Indian corn, as per sample, at £12. 15s. per ton, payment cash, less one-half per cent., to be taken from alongside the vessel, free of charge except weighing and measuring;" and these words were added by the agent of the plaintiffs: "I agree to send boats alongside as soon as I hear of the vessel being ready to discharge." *Held*, that such words so added did not imply a condition, the performance of which it was necessary to aver in the declaration. *Ibid*

## SAMPLE.

See EVIDENCE, 4.

SALE, 2, 3.

## SCIRE FACIAS.

See LIMITATIONS, STATUTE OF, 3, 4, 5.

1. The Court will not, as against an executor *de son tort*, permit the revival of a judgment.—*Semble*. C. P. *O'Malley v. O'Malley* 78
2. Where an interlocutory judgment had been obtained against a *feme dum sola*, and before final judgment she marries, the proper course is to enter a suggestion, and there is no necessity to apply for a *scire facias* to revive the judgment. Q. B. *Coates v. Shields* 216

## SERVICE, &c.

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3. This Court will not allow a *scire facias* to issue for the revival of a judgment, where that judgment has been assigned, and there has not been any payment on foot of it to the assignee, unless there be some evidence, other than the affidavit of the assignee, to show that there was something due on foot of the judgment at the time of the assignment. Where it appeared that the conusor was a party to the deed of assignment, by which the assignor covenanted that there was a sum then due on foot of the judgment, the Court considered that there was sufficient evidence. C. P. *Agar v. Phaire* 330

4. *Scire facias* issued at the suit of A B, the assignee of a judgment, averring in the ordinary manner the execution, by the conusee, of the deed of assignment, and according to the form of the statute, "as by the memorial and record thereof remaining in our said Court, &c., manifestly appears." Plea *executio non*, because the conusee did not assign, transfer, or make over the said alleged judgment debt and damages in the *scire facias* mentioned to the said A B *modo et formâ*, &c., concluding with a prayer of judgment. *Held*, on special demurrer, that the plea was bad. C. P. *Assignee of Lynch v. Kennedy*. 341

## SEAL.

See EVIDENCE, 10.

## SECURITIES.

See GOVERNMENT STOCK.

## SERVICE OF PROCESS.

See SETTING ASIDE PROCEEDINGS, 4.

## SERVICE, SUBSTITUTION OF.

1. *Semble*.—That where there has been by an order of the Court a substitution of the service of a *capias ad respondendum*, it is not necessary that an affidavit should be filed verifying the service originally effected by the

process-server. And at all events, it is irregular to apply to set aside the subsequent proceedings for want of such affidavit, without first seeking to set aside the order for the substitution of service. L. E. *Morris v. McCormick* 45

2. Where the defendant being confined in a private Lunatic Asylum, the process-server gave copies of the writ and notice at foot, and showed the original to the proprietor of the asylum (who refused to let him see the defendant) and to the defendant's brother, who was managing defendant's business in the house of the latter, the Court ordered that service of the writ of *capias* and of the order upon the defendant's brother, who was conducting the defendant's business on his behalf, and on the keeper of the Lunatic Asylum, be deemed good service of the defendant; serving upon the brother and keeper the particulars of the plaintiff's demand, and transmitting second copies of the process, order and said demand to the keeper of the Lunatic Asylum, to be by him transmitted to the person who pays for the maintenance of the defendant. L. E. *Vance v. O'Connor* 60
3. Order for the substitution of service of a *capias ad respondendum*, under certain circumstances, upon the niece of a defendant, who resided with him. C. P. *Fottrell v. Armstrong* 70
4. This Court will not substitute service on a partner resident within the jurisdiction, for his co-partner out of the jurisdiction, though the debt be sworn to be a partnership one. Q. B. *McCann v. Thomson* 201

#### SETTING ASIDE PROCEEDINGS.

See PAYMENT INTO COURT.

PLEADING, 44, 47.

1. *Semble*—That where there has been by an order of the Court a substitution of the service of a *capias ad respondendum*, it is not necessary that an affidavit should be filed verifying the service originally effected by the

process-server. And at all events, it is irregular to apply to set aside the subsequent proceedings for want of such affidavit, without first seeking to set aside the order for the substitution of service. L. E. *Morris v. McCormick* 45

2. Where there being no affidavit of service of process upon two of three defendants, who had been included in the same *capias*, and yet the plaintiff entered parliamentary appearances for them, and declared jointly against all three; the Court refused to set aside the proceedings, but ordered the declaration to be amended by striking out the names of the parties who had not been served. L. E. *Morris v. Scully* 47
3. The Court refused with costs an application to set aside a demurrer taken after nearly twelve months had elapsed, and a rule for *non pros*. had been entered to a plea; on the ground that to a declaration in trespass against two, they pleaded jointly, that they were "not guilty," without adding "or either of them." L. E. *Murray v. Lowry* 49
4. Where the only affidavit of the service of the writ was that of the process-server, which stated that he personally served the defendant with a writ of *capias ad respondendum* dated the 1st of February 1847, returnable the 17th of February 1847, with a notice at foot directing the defendant to appear at the return thereof, being the 17th day of April 1847; the Court set aside the parliamentary appearance and subsequent proceedings, upon an affidavit by the defendant "that he was not served with any process in this cause by J. M. the process-server, or by any other person, and never knew of the institution of this suit until the Sheriff of the Queen's County entered his house and seized his goods and chattels at the suit of the plaintiff." L. E. *Moonneys v. Purcell* 51
5. The Court will not allow a declaration to be amended by adding Counsel's

## SERVICE, &c.

signature to it, unless it is satisfactorily shown that that the draft was submitted to Counsel, and that he by mistake omitted to sign it, but will set it aside. *L. E. Harrison v. Kenny* 53

6. A rule to plead entered upon a day previous to the service of notice of the filing of the declaration is a mere nullity, and where a rule to plead had been entered under such circumstances, and a plea in abatement filed after the expiration of four days from service of notice of the filing of the declaration, an application by the plaintiff to set aside the plea was refused with costs. *C. P. Purdon v. Leavy* 67
7. Where a plea of confession accompanied by a release of errors was given, and afterwards a declaration was filed for the purpose of entering up judgment upon that plea, which declaration was intitled of a Term subsequent to that of the appearance, upon motion grounded upon two notices; the one unjustly imputing to the plaintiff a breach of faith in marking the judgment, and the other alleging that the judgment had been marked without any *capias* having been sued out; the Court refused to set aside the judgment. (*TORRENS, J., dissentiente.*) *C. P. Cochrane v. Comyn* 71
8. A Corporation cannot be sued by *capias ad respondendum*, and proceedings against them founded on such process are null and void, and will be set aside. *Q. B. Kelly v. The Midland Great Western Railway Company* 305

### SHAREHOLDER.

See DEPOSIT.

### SHARES.

See DEPOSIT.

### SHERIFF.

See INTERPLEADER.

### SHERIFF'S RETURN.

1. Where a Sheriff being ruled to return the writ under a conditional fine,

## SHERIFF'S RETURN. 43

does actually return it, the Court will not, if the return is bad, make the fine absolute, but will compel him to amend his return. *L. E. Harton v. Guardians of Ballinrobe Union* 24

2. To entitle him to an interpleader order, an application to the Court or a Judge in Chamber must be made by the Sheriff at an early period after he has been made acquainted by the parties with their respective claims. *C. P. Alexander v. Connell* 325
3. Form of order calling upon the rival claimants to appear before the Court, where they have not appeared upon a special motion by the Sheriff for an order of interpleader. *Ibid*
4. The time for disputing the Sheriff's right to the protection of the Court is when he first applies for the order to interplead. If the adverse claimants have appeared in Court upon that motion, it is too late for them afterwards to impugn the Sheriff's right to relief when the money has been lodged in Court. *C. P. Alexander v. Handy* 328
5. In ordinary cases under this Act the Sheriff is not entitled to his costs. *Ibid*

### SHERIFF'S RETURN.

1. A return of goods on hands for want of buyers, is a bad return to a writ of *venditioni exponas*. *Q. B. Harton v. The Guardians of the Ballinrobe Union* 24
2. That the Sheriff has seized all the goods of the defendant in his bailiwick, without specifying their nature or value, is a bad return to a *feri facias*. *L. E. Doolan v. Egan* 49
3. To a *fi. fa.* in this action, issued in October 1848, the Sheriff returned that previously to its delivery to him, four similar writs against the same defendant had been delivered to the late Sheriff, of which the first writ was so delivered upon the 15th of February 1847, and was returnable upon the 15th of April 1847; the second was so delivered upon the 12th of Novem-

ber 1847, and returnable on the 19th of the same month; the third was so delivered upon the 31st of December 1847, and returnable on the 11th of January 1848; and the fourth was so delivered upon the 6th of January 1848, and returnable on the 11th of the same month. He then specified in the same manner the delivery to himself (the present Sheriff) of six other writs of *fi. fa.* against the same defendant, and before the delivery of the writ in the present action; and then certified that by virtue of the four first writs, and according to their respective priorities, the late Sheriff seized certain goods belonging to the defendant, and of a certain value, and that those goods remained on hands for want of buyers, and that the defendant had not any other goods within the bailiwick at the time of the delivery of the writ in this action to the present Sheriff, or at any time since, whereout he could levy the sum therein mentioned, or any part thereof. *Held* a bad return, and that the Sheriff must amend it, and pay the costs of the motion for compelling him so to do. C. P. *Prendergast v. The Earl of ———* 318

## SOLICITOR.

See ATTORNEY.

## SPECIAL JURY.

This Court will not sanction a consent entered into at *Nisi Prius* between the attorneys of the parties to pay the jury a larger sum than they are entitled to. Q. B. *Molloy v. Browne* 503

## STALL.

See MARKET.

## STATUTES.

PARTICULAR STATUTES CITED OR COMMENTED ON.

*Henry VIII.*

27, c. 16. Bargain and Sale—Enrolment 341

## STATUTES.

*James I.*

11, c. 8. Outlawry—Bail 572

*Charles I.*

10, sess. 3, c. 8. Writ of Error—Security 505  
10, 11, c. 3. Ecclesiastical Leases 492

*Charles II.*

17, 18, c. 12. Writ of Error—Security 505

*William III.*

10, c. 6. Glebe Lands—Leases 492

*Anne.*

4, c. 14. Borough Weighmaster 10  
6, c. 15. Outlawry—Bail 572

*George I.*

8, c. 4. Limitations—Bond 372, 442

*George II.*

5, c. 4. Lease—Renewal—Surrender 272  
9, c. 5. Assignment of Judgment 341

*George III.*

17, c. 26. Annuity—Enrolment 341  
25, c. 44. Manor Courts 294  
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53, c. 141. Annuity—Enrolment 341

*George IV.*

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5, c. 102. Dublin Police Act 538  
5, c. 159. Hibernian Joint Stock Company 482  
6, c. 42. Banking Act 482  
7, c. 41. Manor Courts 294  
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7, 8, c. 59. Manor Courts 294  
9, c. 14. Limitation of Suits 461  
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- 10, c. 34. Assault—Summary Conviction 1

### *William IV.*

- 2, c. 4. Embezzlement—Public Officer 407  
2, c. 17. Subletting Act 366  
3, 4, c. 27. Limitation of Suits, 8, 372, 442  
6, 7, c. 29. Dublin Police 538  
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3, 4, c. 105. Bail—Outlawry—Limitation of Suits—Bail 372, 572  
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3, 4, c. 109. Corporation Property—Alienation 348, 359  
5, 6, c. 24. Police Act 538  
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6, 7, c. 96. Defamatory Libel—Costs 511  
7, 8, c. 5. Government Stock 407  
7, 8, c. 90. Limitation of Suits 372  
7, 8, c. 100. Cashel Railway Act 219  
8, 9, c. 18. Lands Clauses Consolidation Act 184, 290, 292  
8, 9, c. 20. Railway Clauses Consolidation Act 184  
8, 9, c. 106. Conveyancing Act 474  
9, 10, c. 64. Interpleader Act 325, 328  
9, 10, c. 111. Ejectment—Habere—Notice of Rent due 198, 400, 405  
10, 11, c. 84. Poor-Law 538, 546  
10, 11, c. 90. Poor-Law 546  
10, 11, c. 92. Poor-Law 546

## STAYING PROCEEDINGS.

*See* TRIAL.

Where proceedings have been stayed until the costs of a former notice of trial are paid, the defendant, though called on, neglects to tax the costs,

## SUGGESTION.

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the plaintiff will be allowed to serve a fresh notice of trial, upon an undertaking to pay the costs of the former notice when taxed. L. E. *O'Brien v. Chadwick* 33

## STOCK.

*See* GOVERNMENT STOCK.

## STOCK-BROKER.

*See* GOVERNMENT STOCK.

## SUBLETTING.

1. An indenture of lease contained a clause against alienation, unless with the consent, under hand and seal of the landlord, and that the indenture should be void without such consent. To a declaration for non-payment of rent, founded on such indenture, the defendant pleaded that the lessee had assigned to him, without the required consent being given by the landlord. *Held*, that the plea was bad, as it did not allege the non-existence of a consent in all the modes specified in the Subletting Act, 2 *W.* 4, c. 17: and that it should have negatived every species of license which could validate the lease. Q. B. *Duke of Leinster v. Metcalf* 365
2. *Semble*.—That the Subletting statutes were passed to effectuate the Common Law right of landlords, and to relieve them from a waiver by implication. *Ibid*
3. *Held*, that general evidence of the change of possession was sufficient proof of the breach of the clause against subletting, and that it lay on the tenant to rebut that evidence. Q. B. *Lessee Lord Ashtown v. White* 400

## SUGGESTION.

Where, after final judgment, one of several co-plaintiffs dies, the survivors may (without issuing a *scire facias*) sue out execution, by first entering upon the roll a suggestion of the death of the party. L. E. *Nesbitt v. Lynch* 62

## SUMMONS.

## SUMMONS.

1. On a writ of error from the Recorder's Court of the borough of Dublin, these several errors were assigned :— that no original writ was stated on the record as having been filed ; that it did not appear that the plaint therein mentioned was returned *non est inventus*, or that the plaint was ever returned or issued ; that there was no averment that any summons had issued or been served previous to the attachment, and that there was no entry thereof, and that no process upon the plaint was stated to have been made or issued ; that there was no sufficient affidavit of debt according to the statute, and that the attachment and bail-piece were not in accordance with the form given by the statute ; that there was a variance between the plaint and the declaration ; that no writ of distringas, or venire, or jury process was averred, and that there was no proper entry of continuances, or of *similiter*. *Held*, that since the passing of 3 & 4 Vic. c. 108 (the Municipal Act), the non-averment on the record of a summons issuing before attachment granted is immaterial. Q. B. *Milner, in error, v. O'Brien* 250
2. In a Manor Court of limited jurisdiction, a summons is the proper mode of proceeding to compel an appearance, and the issuing an attachment is illegal and contrary to the policy of the Manor Court code. Q. B. *Costelloe v. Hooks* 294

## SURETY.

The Court will not, on motion, order the recognizance of a plaintiff in error in the Exchequer Chamber, and of his sureties, to be vacated, although the judgment of this Court be reversed, while a writ of error is pending to the House of Lords. Q. B. *Smith v. Darley* 505

## SURRENDER.

See LEASE, 1, 2.

## TRIAL.

## TAIL.

See ESTATE TAIL.

## TAXATION.

See COSTS, 2.

## GENERAL RULES.

## STAYING PROCEEDINGS.

1. This Court has no jurisdiction to review the taxation of costs by the Master under the Lands Clauses Consolidation Act (1845), 8 Vic. c. 18, s. 52. Q. B. *Tennant v. The Mayor and Burgesses of Belfast* 290
2. This Court will not grant a mandamus to the Master of this Court, commanding him to review his taxation of costs under the 8 Vic. c. 18. Q. B. *In re Scully v. The Great Southern and Western Railway Company* 292

## TERM'S NOTICE.

In an action upon a judgment of 1834, in which issue was joined in 1842, but proceedings were stayed until 1846, at defendant's request, under promises that he would settle the demand, the plaintiff was allowed to proceed to trial upon giving a Term's notice. L. E. *Strettle v. Morphy* 44

## TOWN-COMMISSIONERS.

See PLEA IN ABATEMENT.

## TRAVERSE.

See PLEADING, 26, 27, 29.

## TRESPASS.

See CONVICTION.

## TRIAL.

In an action upon a judgment of 1834, in which issue was joined in 1842, but proceedings were stayed until 1846, at defendant's request, under promises that he would settle the demand, the plaintiff was allowed to proceed to trial upon giving a Term's notice. L. E. *Strettle v. Morphy* 44

USAGE OF TRADE.

A declaration averred a bargain and sale of Indian corn, as per sample, at the rate of £12. 15s. per ton, and alleged as breach the non-delivery of the corn. At the trial this question was put to a witness, "whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn as distinguished from its condition?" *Held*, that this was not a legal question, and was properly objected to, because the words "as per sample" in the contract are unambiguous, and no usage of trade can be admitted to vary or contradict the plain terms of a contract. Q. B. *Malcomson v. Morton* 230

USURY.

*See* COSTS, 6.

VARIANCE.

*See* PLEADING, 5, 6, 7.

VENDITIONI EXPONAS.

A return of goods on hands for want of buyers, is a bad return to a writ of *venditioni exponas*. Q. B. *Harton v. The Guardians of the Ballinrobe Union* 24

VENUE.

A special demurrer having been filed to a count on a bill of exchange, the

plaintiff applied for leave to amend generally on payment of costs, and to change the venue, without assigning any grounds for the latter part of the application. *Held*, that the first part of his motion should be granted, and the latter part refused, and that he should pay the costs of the motion. C. P. *Evans v. Figgis* 587

WAIVER.

*See* SUBLETTING.

WARRANT.

*See* COMMITTAL.

WARRANTY.

*See* SALE.

WEIGHMASTER.

A weighmaster appointed under the 3rd section of the statute 4 *Anne*, c. 14, holds his office for life. An appointment to hold it during pleasure is void. L. E. *Stephenson v. Stephens* 10

WILL.

*See* DEVISE.

EVIDENCE, 17, 18, 19.

WITNESS.

*See* EVIDENCE, 3.

WRIT.

*See* AMENDMENT, 4.  
ERROR.

*Ex. R. J. O.*

















